89-651

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROGER BURRELL,
Petitioner,
vs.
CITY OF LOS ANGELES, et al.,
Respondents.

LOS ANGELES CITY EMPLOYEES UNION, et al.,
Petitioners,
vs.
BOARD OF CIVIL SERVICE COMMISSIONERS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FIVE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When a nonprobationary public employee has a property right in a position, must the constitutionally required administrative hearing procedure provide for an impartial adjudication of the extent of the penalty, as well as of any charges of misconduct?

2. (a) Does constitutional due process permit a Charter scheme which allows the manager who suspended or terminated such a public employee to veto the penalty determined to be appropriate by the independent adjudicatory board which was provided by Charter to hear employee's appeal? (b) If so, must such a manager consider only evidence submitted to the administrative board in determining whether to veto the board's recommendation?

LIST OF ALL PARTIES

This petition is brought by all of the plaintiffs in two actions in the California courts, which were consolidated for a decision by the California Court of Appeal, Second Appellate District, Division Five.

In the *Burrell* action, the Plaintiff and Appellant was Roger Burrell, a nonprobationary employee of the City of Los Angeles. He is a Petitioner here.

Those Respondents who were the Defendants and Appellants in the *Burrell* action are the City of Los Angeles, a municipal corporation; Douglas S. Ford, the General Manager of the Community Development Department, a department of the City of Los Angeles; and the Board of Civil Service Commissioners, an independent adjudicatory Board of the City of Los Angeles. Respondent Ford subsequently has been replaced as General Manager of the concerned department by Parker C. Anderson.

The Petitioners from the *Los Angeles City Employees Union* action (also referred to as "*Godino*") who were the Plaintiffs and Respondents below included four public sector employee organizations ((1) Los Angeles City Employees Union, Local 347, Service Employees International Union, AFL-CIO, a California nonprofit corporation; (2) Engineers and Architects Association, an unincorporated association; (3) Local 18, International Brotherhood of Electrical Workers, AFL-CIO, an unincorporated association; (4) Los Angeles City Supervisors and Superintendents Association, a California nonprofit corporation) and Richard A. Godino, a nonprobationary employee of the City of Los Angeles.

Those Respondents who were the Defendants and Appellants in the *Godino* action are the Board of Civil Service Commissioners of the City of Los Angeles, an independent adjudicatory body of the municipal corporation; the City of Los Angeles, a municipal corporation;

and James E. Hadaway, in his official capacity as General Manager of the Department of Recreation and Parks of the City of Los Angeles.

At the time that both actions were brought, the Board of Civil Service Commissioners was comprised of Anthony De Los Reyes, Geraldine D. Green, Casimiro U. Tolentino, Raymond Fisher, and Alan Friedman. As a result of new appointments, pursuant to the City's Charter, the Board now consists of Anthony De Los Reyes, Lance Brisson, Antoine Y. Mansour, Kenneth Flowers, and Casimiro U. Tolentino.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Statues

Constitution

Rules

Miscellaneous

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PETITION FOR WRIT OF CERTIORARI

The Petitioners herein, including four employee organizations and two employees of the City of Los Angeles, petition for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Five, in this case.

OPINIONS BELOW

The Opinion of the Court of Appeal (Appendix A) is reported in 209 Cal.App.3d 568 and in 257 Cal.Rptr. 427. It was modified without a change in judgment (pp. A27-A29, *infra*), and a petition for rehearing was denied (p. A30, *infra*).

On July 20, 1989, the Supreme Court denied review (Appendix B) in an order which also denied requests for an order directing depublication of the Court of Appeal's opinion. That order was not reported.

The following decisions of the Superior Court were not reported:

Appendix C: *Los Angeles City Employees Union, SEIU, Local 347 v. Board of Civil Service Commissioners* ("*Godino*"):

Statement of Decision at pp. C1-C10; and Judgment at pp. C11-C14.

Appendix D: *Burrell v. City of Los Angeles* ("*Burrell*"):

Transcript of the oral Statement of Decision at D1-D24; and

Judgment granting peremptory writ of mandate at D25-D29.

JURISDICTION

Judgment of the Court of Appeal was entered on April 10, 1989, and was final as to that court on May 10, 1989. Petitioners timely sought a review by the California Supreme Court, which was denied on July 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence [*sic*] to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Los Angeles City Charter §112 is set forth in its entirety in Appendix A at A6-A8. Charter §112(a), the subject matter of this litigation, reads:

> "Any board or officer having the power of appointment of officers, members and employees in any department of the government of the city shall have the power to remove, discharge or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds

stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended to be reinstated or restored to duty. The board *with the consent of the appointing authority* may also order a reduction in the length of the suspension, or substitution of a suspension for removal or discharge, if the board finds, in writing, that such action is warranted. The order of said board with respect to such removal, discharge or suspension shall be forthwith certified to the appointing board or officer, and shall be final and conclusive; providing, that the order of any appointing board or officer suspending any person because of lack of funds in such department shall be final, and shall not be subject to review by said Board of Civil Service Commissioners. If the Board of Civil Service Commissioners shall order that any person removed, discharged or suspended under the provisions of this section be reinstated or restored as above provided, the person so removed, discharged or suspended shall be entitled to receive compensation from the city the same as if he had not been removed, discharged or suspended by the appointing board or officer." (Emphasis added.)

STATEMENT OF THE CASE

This case involves the constitutionality of the Charter scheme of the City of Los Angeles (hereinafter, "City"), which provides limited review of the disciplinary actions taken against nonprobationary civilian employees.[1] Employees having a property interest in their continued employment are entitled to a hearing[2] before the Board of Civil Service Commissioners (hereinafter, "Board") on the grounds for the disciplinary action. If no grounds for discipline are sustained, the appealing employee is reinstated with back pay.

The problem arises when any ground is sustained and the Board finds that a reduced penalty would be appropriate. According to the Court of Appeal, the "charter provision limits the ability of the Board to reduce the disciplinary penalty by requiring that any reduction in the penalty recommended by the Board be consented to by the same official who originally imposed the discipline." Court of Appeal decision (hereinafter, "Decision") at A2, *infra.*

A City employee loses pay and benefits as a result of the "filing" of a "statement" of discharge or suspension. Such a "statement" results from a department manager's[3] decision, which follows a consideration by the manager of all of the grounds for the personnel

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[1] Sworn police and fire employees are covered by entirely different systems, pursuant to Charter §§135 and 202.

[2] Although Charter §112 provides for only an "investigation" by the Board, that has been interpreted to include an evidentiary hearing. *Steen v. Board of Civil Service Commissioners*, 26 Cal.2d 716, 160 P.2d 816, 820-21 (1945).

[3] In some departments, the discharge or suspension decision is made by a managing board. See Charter §112(a).

action, including any predeprivation response by the accused employee.[4] That manager's decision becomes the final personnel action, unless it is appealed to the Board.

If the Board receives an appeal, it assigns a hearing examiner to conduct an evidentiary hearing. The department manager appoints an agent to advocate the correctness of the manager's decision at the hearing. The Board's hearing examiner prepares findings and recommendations to the Board, and the Board makes findings on each charge.

However, if the Board decides that a lesser penalty is appropriate, it may implement that reduced penalty only "with the consent of the appointing authority," the department manager. Charter §112(a). When the evidentiary hearing results in a Board finding that the penalty should be reduced, the manager may simply veto the penalty reduction without relying upon the evidence which was elicited before the Board's hearing examiner.

Two actions were brought to challenge the constitutionality of that scheme. The first (*Los Angeles City Employees Union, Local 347 v. Board of Civil Service Commissioners* ("*Godino*")) was brought by four employee organizations and a single nonprobationary employee. The employee had received and had appealed a 10-day suspension, which the Board had unanimously proposed to reduce to a 3-day suspension after an evidentiary hearing. The manager (Defendant Hadaway) had refused to consent to the lesser suspension, and the suspension was not reduced.

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[4] A limited, predeprivation "right to respond" is required by *Skelly v. State Personnel Board*, 15 Cal.3d 194, 215, 124 Cal.Rptr. 14, 28-29, 539 P.2d 774 (1975).

Judge Deering, hearing the motion for a peremptory writ of mandate in *Godino*, found that the City's scheme violated constitutional due process both on its face and as applied, and that Godino had been "deprived of full hearing on the severity of the 10-day suspension without pay . . . ." *See Godino* at C4-C7 and C9, *infra*. Thereafter, Judge Kurt Lewin granted summary judgment in the declaratory relief cause of action in favor of the plaintiffs in *Godino*, finding that the language of Charter §112 and the "consistent application of that provision by the Board" resulted in

> "too great a probability of unfairness, and too great a probability of actual bias on the part of the appointing authority for that provision to be constitutionally tolerable without severing the phrase 'with the consent of the appointing authority'." *Godino* at C13, *infra*.

Judge Lewin found that the "consent" phrase resulted in a violation of constitutional due process and rendered judgment for the plaintiffs. *Godino* at C13-C14, *infra*.

The second case (*Burrell v. City of Los Angeles* (hereinafter, "*Burrell*")) was brought by a nonprobationary employee who had been discharged and who had no available hearing to recover the property right in his position, other than the hearing which ultimately could have placed the penalty back into the hands of the manager who had discharged him. Judge Jerry Fields granted Burrell's petition for writ of mandate and directed judgment in his favor, finding that

> "To give the person who ordered [Burrell] to be terminated the final review as to whether or not such punishment should be modified is to deny [Burrell] due process,

> for on its face such procedure prevents a fair and impartial hearing.
> "Where the appointing authority has discretion to impose varying penalties, the right to a fair hearing includes the right to present evidence on the severity of the penalty." *Burrell* at D4-D5, *infra.*

Judge Fields also noted that there were "no rules or guidelines as to what the appointing authority may or may not consider in reaching his veto of the Board's decision regarding the penalty. He or she may rely on evidence not produced at the adjudication hearing." *Burrell* at D5, *infra.*

The Court of Appeal, limiting its analysis to whether the "consent" phrase was unconstitutional on its face, reversed both lower court judgments and found that the City's scheme met the standard of federal due process. See Decision at A5-A15 and A24, *infra.*

Although Justice Mosk was of the opinion that the Court of Appeal's decision should be reviewed, the California Supreme Court denied the petition. See Appendix B. That court also denied requests for an order directing depublication of the Court of Appeal's decision. *Id.* As a result, that decision may be cited as California precedent. See Rule 977, California Rules of Court.

REASONS FOR GRANTING THE WRIT

Unless this Court grants the writ, the second most populous city in the United States will continue suspending and terminating its employees who have property interests in their employment without a procedure for providing a due process hearing including an impartial adjudication of the amount of penalty. The published Court of Appeal decision can be expected to provide a "road map" for other public jurisdictions which seek to insulate a manager's penalty decision from impartial review. Perhaps most importantly, a writ in this case would provide the Supreme Court the opportunity to resolve two issues of importance to the administrative adjudication of public employee appeals: whether an appeal required by law requires the submission of all disputed issues, including the extent of the penalty; and whether an administrative hearing procedure may be found to be violative of due process because a risk of bias results from that procedure.

REVIEW IS NECESSARY TO ESTABLISH A DUE PROCESS PROCEDURE FOR CITY EMPLOYEES

Every year, scores of City employees with property interests are subject to the City's disciplinary review process. Although most are decided in ways which do not involve conflict between the Board and the departmental manager, unrebutted evidence demonstrated that such conflicts have existed and were resolved at the expense of the employee. Of 17 surveyed personnel actions in a two-year period, each of which involved a Board-recommended reduction of penalty, *some* reduction of the penalty was agreeable to the

manager in only 5 cases. In 10 of those appeals, including the appeals of four employees who remained terminated when the Board had recommended suspension, the manager vetoed the Board's request.

Such a review understates the effect. Every employee appealing an action recognizes that the issue of the fairness of the penalty (if a single ground for discipline is sustained) ultimately will be determined by the manager who has imposed the penalty. Regardless of the Board's penalty decision, that manager may veto any penalty reduction. There are no standards for such vetos. There is no administrative procedure to question or to challenge a manager's post-hearing veto. There is no requirement that the manager limit his consideration to evidence which has been submitted to the Board.

Without a writ from this Court, the City will continue its free-wheeling approach to employee penalties, with the full sanction of the California courts. At the same time, if the process is later found to be unconstitutional by the federal courts, the City will be accruing potential damages and back pay for every employee that it suspends or discharges.

THE COURT OF APPEAL DECISION WILL LEAD OTHER CALIFORNIA JURISDICTIONS TO INSULATE MANAGERS' PENALTY DECISIONS

The Court of Appeal decision is the first time that California courts have approved a system in which a public manager's decision on penalty may be insulated from review in a constitutionally mandated due process hearing. That published decision and the California Supreme Court's refusal to review or "depublish" that

decision has opened the door for California public employers to establish similar systems.

THE WRIT IS NEEDED TO CLARIFY AREAS OF ADMINISTRATIVE LAW AND CONSTITUTIONAL DUE PROCESS

As a result of this Court's 1985 decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985), local government entities "cannot mandate which procedures they unilaterally deem adequate to protect an individual's due process rights; the minimum requisite procedures are *federally* mandated." Decision at A9, *infra*. As a result, local entities and local government employees need the guidance of this Court so that they may ascertain the federally required minimum due process standards in two disputed areas of administrative law, discussed below.

First, local entities need to know whether the function of an appeal, when such an appeal is required by local law, requires a review of the entire dispute, including the extent of the penalty.

In the context of a discussion of an employee's liberty interests, this Court noted an analogy between such hearings and those provided for parole revocations. *Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 884, 51 L.Ed.2d 92 (1977). There, the Supreme Court noted that parole hearings are a "two step" process: (1) whether the parolee "committed the violation with which he is charged", and (2) "whether if he did commit the act his parole should, under all the circumstances, therefore be revoked." *Id.* By analogy, one would expect that an employee having a property interest in his job would be

entitled to a hearing which would determine (1) whether he committed the acts leading to the discipline; and (2) if so, whether the penalty which was imposed was appropriate.

In the Court of Appeal decision, that court determined that the second step is not required as a matter of constitutional due process: "What *is* owing to the disciplined employee is the right to have the reviewing body determine whether there is sufficient evidence to uphold the charges of misconduct." Decision at A15, *infra*. As yet, there is no Supreme Court decision requiring a local governmental entity to administratively adjudicate all of the issues in dispute where the employee has lost a property interest, even where an appeal is required by local law.

Second, the conflict between the Court of Appeal and the Superior Court in their respective analyses of impartiality in the administrative proceeding demonstrates another area where governmental entities need the guidance of this Court. All three trial court judges found that the system which provided that the department manager could veto the penalty recommendation resulting from the administrative hearing resulted in a risk of unfairness that was intolerably high. In so holding, those trial court judges relied upon decisions from this Court which have repeatedly demonstrated the importance of impartiality in decision making. *See, e.g., In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) ("But our system of law has always endeavored to prevent even the probability of unfairness."); *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975) ("[V]arious situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally

tolerable.");[5] *Morrissey v. Brewer*, 408 U.S. 471, 486, 92 S.Ct. 2593, 2602-03, 33 L.Ed.2d 484 (1972) (prohibiting a "preliminary hearing" before a parole officer who had initiated the arrests, noting, "The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them."); *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970) (prohibiting the use of a previous participant in "making the determination under review" as a final internal decisionmaker).

In contrast, the Court of Appeal found that federal decisions "support the distinction between the due process required in a judicial proceeding and that required in an administrative hearing." Decision at A14, *infra*. It tacitly decided that the "probability of bias" test for impartiality should not have been utilized, holding, "The Constitution is offended, according to the Supreme Court, by an ultimate decisionmaker who exhibits personal animosity toward the employee or who is financially interested in the outcome of the proceedings." Decision at A15, *infra*. It dismissed the trial courts' findings that there were impermissible risks of bias in the §112 scheme as "speculations" which did not demonstrate due process violations. *Id.*

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[5] In the *Withrow* decision, this Court may have predicted the instant dispute:

> "Allowing a decisionmaker to review and evaluate his own prior decisions raises problems that are not present here. Under the controlling statutes, the Board is at no point called upon to review its own prior decisions." *Withrow v. Larkin, supra*, 421 U.S. at 58 n. 25, 95 S.Ct. at 1470 n. 25.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this writ of certiorari be granted by this Court.

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

ROGER BURRELL,
Plaintiff and Appellant,
v.
CITY OF LOS ANGELES et al.,
Defendants and Appellants.

2d Civil No. B027696
(Super. Ct. No. C633835)

LOS ANGELES CITY
EMPLOYEES UNION et al.,
Plaintiffs and Respondents,
v.
BOARD OF CIVIL SERVICE
COMMISSIONERS,
Defendants and Appellants.

(Super. Ct. No. C603176)

In this consolidated appeal, we consider the constitutionality of a portion of section 112 of the city charter of Los Angeles. Section 112 gives a city employee the right to have the disciplinary measures

ordered by an official in his or her department reviewed by the Board of Civil Service Commissioners (the "Board"). However, this charter provision limits the ability of the Board to reduce the disciplinary penalty by requiring that any reduction in the penalty recommended by the Board be consented to by the same official who originally imposed the discipline. In both of the cases before us, the trial courts declared unconstitutional the consent requirement of section 112, finding that it amounts to a denial of the due process rights of city employees to a fair and impartial hearing.

FACTS

This appeal consolidates two separate trial court actions: Los Angeles City Employees Union v. Board of Civil Service Commissioners (Super. Ct. L.A. County, No. C603176) ("the Godino case") and Burrell v. City of Los Angeles (Super. Ct. L.A. County, No. C633835) ("the Burrell case").

a. The Godino Case

The City of Los Angeles employed Richard Godino as the Aquatic Director of the Department of Recreation and Parks' Pacific Region. In 1985, Godino was accused of failing to follow proper departmental procedures for the handling of money, resulting in the loss of some $2,017 in parking revenues. James Hadaway, the department's general manager, ordered a 10-working day disciplinary suspension of Godino. Godino appealed Hadaway's decision to the Board pursuant to section 112 of the city charter.

Godino appeared before a civil service hearing examiner on November 20, 1985, for a hearing in which

written evidence was offered and testimony was taken. Based on the evidence, the hearing examiner stated in her report to the Board that the charge of improper money handling was insufficient to warrant a two-week suspension, and recommended that the penalty be reduced to a "Notice to Correct." The Department of Recreation and Parks objected to the hearing examiner's recommendation of a lesser penalty and requested that the Board sustain the charges, as well as the suspension. In its objection, the Department introduced new evidence of instances of improper money handling by other employees, and the penalties imposed for those infractions. The hearing examiner had not considered this evidence. The Board then met on February 7, 1986, to decide the Godino appeal. All the commissioners present agreed that the 10-day punishment was too harsh, and unanimously requested that the Department consider a shorter suspension period. At a second meeting of the Board held the following month, general manager Hadaway refused to diminish the punishment he had ordered; and the Board — feeling constrained by the dictates of section 112 — reluctantly sustained the penalty which Hadaway wanted.

Godino next sought declaratory judgment and a writ of mandate from the superior court. He requested that the court find section 112 unconstitutional on its face, that it set aside the 10-day suspension and enter a new decision based upon the Board's determination of an appropriate penalty, and that it restore to him all back pay and other benefits to which he might be entitled following the Board's redetermination of his penalty. The court (Warren Deering, presiding) granted the writ on October 14, 1986, but subsequently refused to issue it until a judgment was entered on all causes of action. A summary judgment motion was then pursued, and the court (Kurt Lewin, presiding) declared section 112

unconstitutional, reasoning that the power of the top departmental official to override the Board on employee discipline matters amounted to a denial of due process as to all city employees. The court also ordered that the writ of mandate be issued. Defendants appealed from this judgment. Finally, the matter was returned to Judge Deering, who signed plaintiff's mandamus order on July 2, 1987.

b. The Burrell Case

Burrell had been employed by the city for five years as a rehabilitation construction specialist when, in 1986, he was charged with violating his employment contract by engaging in activities which constituted a conflict of interest. The official having the power of appointment in Burrell's department, Douglas Ford, ordered that Burrell's employment with the city be terminated. Burrell appealed this decision to the Board. Unlike Godino, Burrell did not have a hearing before a Board examiner nor did the Board make a determination in the matter. Instead, Burrell immediately sought a writ of mandate in the superior court, alleging that the Board had suspended review of pending disciplinary appeals because its hearing procedure was constitutionally defective in light of the decision in the Godino matter. Burrell asked the court to reinstate his employment until the city adopted adjudicatory procedures which would afford him a full due process hearing on the issue of the charges against him and the penalty ordered by the departmental official. Burrell based his petition on Judge Deering's statement of decision in the Godino case.

In opposition, the city argued that Burrell had not exhausted his administrative remedies because the Board had not yet acted upon his appeal from Ford's decision

to discharge him. The city also argued in favor of the constitutionality of section 112. The trial court (Jerry Fields, presiding) disagreed. After taking judicial notice of Judge Deering's decision in the Godino case, the court arrived at substantially the same conclusion. Namely, it concluded that section 112, as drafted, violated state and federal due process rights. The court also found that the charter provision's requirement that the Board obtain the consent of the departmental authority in order to reduce a disciplinary penalty was severable from the rest of section 112. Accordingly, it ordered the Board to conduct a hearing in the Burrell matter pursuant to section 112 without giving effect to that section's consent language. The court also ordered that the city give Burrell back pay and benefits retroactive to the date of his discharge.[1]

The city appealed the judgments in favor of respondents in both cases. Burrell cross-appealed, seeking back pay.

DISCUSSION

1. Due Process

The Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15 of the California Constitution guarantee that no one may be deprived of his property without due process of law.

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[1] The city represents in its reply brief that Burrell went through the administrative appeal process after the judicial appeal was filed in this case. The Board, following a full hearing, sustained the charges against Burrell and recommended a six-month suspension. The department officials in Burrell's department consented to this recommendation and reduced Burrell's discipline to a six-month suspension.

When the government has conferred upon a person a legally enforceable right or entitlement to a government benefit, such as an interest in continued employment by the government absent sufficient cause for termination, this right constitutes a property interest protected by due process principles. (*Perry v. Sindermann* (1972) 408 U.S. 593, 602-603; *Board of Regents v. Roth* (1972) 408 U.S. 564, 576-578; *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 206-207.)

Appellants readily concede that Godino and Burrell possessed property rights in their continued employment by the city because section 112 of the city charter expressly states that permanent employees may not be suspended or discharged except for written cause.[2]

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[2] Section 112 provides:

"(a) Any board or officer having the power of appointment of officers, members and employees in any department of the government of the city shall have the power to remove, discharge or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such

(continued)

Accepting the concession that the due process clause applies to these employees, the question remains

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(ftn. continued)

removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended to be reinstated or restored to duty. *The board with the consent of the appointing authority may also order a reduction in the length of the suspension, or substitution of a suspension for a removal or discharge, if the board finds, in writing that such action is warranted.* The order of said board with respect to such removal, discharge or suspension shall be forthwith certified to the appointing board or officer, and shall be final and conclusive; provided, that the order of any appointing board or officer suspending any person because of lack of funds in such department shall be final, and shall not be subject to review by said Board of Civil Service Commissioners. If the Board of Civil Service Commissioners shall order that any person removed, discharged or suspended under the provisions of this section be reinstated or restored as above provided, the person so removed, discharged or suspended shall be entitled to receive compensation from the city the same as if he had not been removed, discharged or suspended by the appointing board or officer.

"(b) The provisions of this section shall not apply to those members of the Police Department appointed under civil service rules and regulations and sworn in, as provided by law, to perform the duties of regular police officers, nor to those members of the Fire Department appointed under civil service rules and regulations to perform the duties of regular firemen; notwithstanding anything contained in sections 135 and 202 of this charter, all other employees of both departments shall be subject to the provisions of this section.

"(c) The provisions of subsection (a) hereof shall not apply to any suspension of five working days or less in any twelve-month period for personal delinquency. The reasons

(continued)

whether the particular procedures mandated by section 112 satisfy the constitutional guarantee of a full and fair disciplinary hearing. Respondents contend that section 112, as presently drafted, unfairly deprives them of their property inasmuch as it fails to afford them all the process which they believe is constitutionally "due."

a. Analysis of Federal Law

The Supreme Court has stated that due process is the opportunity to be heard at a meaningful time and in a meaningful manner. (*Parratt v. Taylor* (1981) 451 U.S. 527, 540, overruled on other grounds *Daniels v. Williams* (1986) 474 U.S. 327, 330-331.)[3] It is a flexible concept requiring accommodation of the competing interests involved, and its procedural requisites necessarily vary depending on the importance of the interests involved and the nature of the controversy. (*Cleveland Board of Education v. Loudermill, supra*, 470 U.S. 532, 542-543; *Mathews v. Eldridge* (1976) 424 U.S. 319, 335; *Board of Regents v. Roth, supra*, 408 U.S. at p. 570, fn. 8.) Although the state (or one of its subdivisions) has

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(ftn. continued)
stated in writing for any such suspension shall be furnished to the suspended employee and promptly filed with the board. Any such suspension which results in an employee having a total suspended time by reason of the exercise of authority under this subsection in excess of five working days in any twelve-month period shall be subject to all of the provisions of subsection (a) hereof." (Emphasis of contested provision added.)

3 Respondents have not questioned the timing of the hearings held in their cases. Due process generally requires that an individual be given an opportunity for a hearing *before* being deprived of any significant property interest. (*Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532, 542-544; *Dwyer v. Regan* (2d Cir. 1985) 777 F.2d 825, 831-834, as modified 793 F.2d 457.)

the prerogative to create a property interest in an entitlement in the first instance, it does not have the prerogative to diminish the minimum procedural guarantees of the constitution once the property interests it created have attached. In other words, state and local governments cannot mandate which procedures they unilaterally deem adequate to protect an individual's due process rights; the minimum requisite procedures are *federally* mandated. (*Cleveland Board of Education v. Loudermill, supra*, 470 U.S. at p. 541.)

At a minimum, an individual entitled to procedural due process should be accorded: written notice of the grounds for the disciplinary measures; disclosure of the evidence supporting the disciplinary grounds; the right to present witnesses and to confront adverse witnesses; the right to be represented by counsel; a fair and impartial decisionmaker; and a written statement from the fact finder listing the evidence relied upon and the reasons for the determination made. (*Goldberg v. Kelly* (1970) 397 U.S. 254, 267-270; *Morrissey v. Brewer* (1972) 408 U.S. 471, 489; *Withrow v. Larkin* (1975) 421 U.S. 35, 46-47. See *Serafin v. City of Lexington, Neb.* (D.Neb. 1982) 547 F.Supp. 1118, 1125 for detailed discussion of the elements of due process.) Of these elements of due process, respondents have singled out only one — the right to a fair and impartial decisionmaker — as being violated by section 112.

The right to a fair trial by a fair tribunal is a basic requirement of due process applying to administrative agencies which adjudicate, as well as to courts. (*Withrow v. Larkin, supra*, 421 U.S. 35, 46.) Respondents contend that their right to a fair tribunal — and the right of all permanent city employees — is violated by the provision in section 112 which prevents the Board from reducing the discipline imposed by the disciplined employee's department manager unless the manager's

consent is obtained first. Respondents and the trial courts find this procedure constitutionally objectionable because it, in essence, permits the same official who instituted and investigated the disciplinary proceedings, and recommended a particular penalty, to have the final say on the severity of the penalty which is ultimately imposed.

The trial judges and respondents in this case have relied on language contained in the Supreme Court's opinion in *In re Murchison* (1955) 349 U.S. 133, 136, stating that our legal system endeavors to prevent even the probability of unfairness. The courts in the instant cases found that there was a high probability of unfairness in section 112's consent requirement. In the *Murchison* case, a state judge was empowered by state law to compel witnesses to testify before him in secret about possible crimes. The judge in question charged two such witnesses with criminal contempt, then tried and convicted them himself. Unsurprisingly, the Supreme Court found a high probability of unfairness and a due process violation in this procedure because it allowed the judge to act as prosecutor and assume an adversary position, and also because the judge's impartiality would be tainted by personal knowledge obtained in the earlier, clandestine proceedings. (*Id.* at p. 138.)

The Supreme Court has, however, distinguished the due process required in an administrative hearing from that required in a judicial proceeding. The court has written, "Plainly enough, *Murchison* has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications." (*Withrow v. Larkin, supra*, 421 U.S. at p. 53.) The court observed that it is "very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or

formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate . . . due process of law. We should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around." (*Id.* at pp. 56-57.) The court was not troubled that the same administrative body which investigated Larkin also issued formal findings against him, because "[t]he risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position." (*Id.* at p. 57.) The court did not, however, decide the constitutionality of allowing a decisionmaker to review and evaluate his own prior decisions. (*Id.* at p. 58, fn. 25.)

The next Supreme Court case to address the impartiality of an administrative decisionmaker was *Hortonville Dist. v. Hortonville Ed. Assn.* (1976) 426 U.S. 482. In the Hortonville case, a number of striking public school teachers were fired by the same administrative body — the local school board — which had been involved in the negotiations preceding and precipitating the strike. The Supreme Court held that this pretermination involvement by the board, without more, did not infect its ability to serve as an impartial decisionmaker in terminating the teachers. Said the court, "[m]ere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not . . . disqualify a decisionmaker. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *FTC v. Cement Institute*, 333 U.S. 683, 700-703 (1948). Nor is a decisionmaker disqualified simply because he has taken a position, even

in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.' *United States v. Morgan*, 313 U.S. 409, 421 (1941)." (426 U.S. at. p. 493.) The court suggested that bias and inability to judge fairly might be demonstrated if the decisionmaker is shown to have a personal or financial stake in the outcome of the decision, or shows animosity toward the employee. (*Id.* at pp. 492, 497.) These predilections on the part of a decisionmaker must be shown to overcome the presumption of honesty and integrity in policymakers with decisionmaking power. (*Ibid.*)

An objectionable personal and financial stake in the outcome of a case was demonstrated in *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813, in which a justice of the Alabama Supreme Court failed to recuse himself from an appeal brought by an insurer at a time when the justice himself was suing another insurer on similar grounds. He cast the deciding vote in the appeal and authored an opinion which soon resulted in his receipt of a "tidy sum" in his own lawsuit. The Supreme Court concluded that this conduct amounted to a violation of appellant's constitutional rights because the judge in question was not impartial.

Applying these Supreme Court decisions to facts more analogous to the ones before us in this appeal, the lower and intermediate federal courts have concluded that the right to a fair and impartial tribunal is not violated by permitting the official who makes the initial disciplinary decision to have the final say in the matter.

The case of *Brasslett v. Cota* (1st Cir. 1985) 761 F.2d 827 illustrates this conclusion. Brasslett, a municipal fire chief, was discharged by Cota, the town manager, after Cota investigated Brasslett's conduct. Under established grievance procedures, disciplined employees

had the right to seek review of the action by a personnel appeals board. After hearing the appeal, the board recommended that Brasslett be reinstated and that Cota consider more lenient disciplinary alternatives. Cota's decision not to follow the recommendation was discretionary and final under the grievance rules. Brasslett contended that "because the recommendation of the Appeals Board was merely advisory, the evidentiary hearing on which it was based is a nullity. Consequently he argues that the fact that the ultimate decision rests with the Manager who made the initial personnel decision, renders the hearing procedurally deficient for lack of an impartial decisionmaker." (761 F.2d at pp. 836-837.) The circuit Court of Appeals rejected the contention, reasoning that the rendering of an advisory opinion to an ultimate decisionmaker does not make the entire hearing process nugatory. The critical question, the court found, was whether Cota, the ultimate decisionmaker, was impartial. Absent a showing of bias by Cota — either personal animosity or financial interest in the outcome of the decision — Brasslett could not complain that his due process rights were violated. (*Id.* at p. 837.)

A similar conclusion was reached in *Nevels v. Hanlon* (8th Cir. 1981) 656 F.2d 372, in which a state employee was terminated by a deputy commissioner of his department for a number of different reasons. Nevels appealed this decision to a personnel appeal board, which found that some of the alleged misconduct was true, but nonetheless believed that dismissal was not warranted. The commissioner rejected the appeal board's recommendation and finalized Nevels' dismissal. Nevels argued that his due process rights were violated because the commissioner was "predisposed to uphold his original decision and is, therefore, not an impartial decisionmaker." (656

F.2d at p. 376.) The court of appeals disagreed, finding no due process violation.

Echoing this conclusion, which is derived from the Supreme Court's statements in *Withrow*, other federal courts have reiterated the presumption that government officials can and will decide particular controversies conscientiously and fairly despite earlier involvement in them. These decisions include *Boston v. Webb* (4th Cir. 1986) 783 F.2d 1163, 1166 (court approves procedure permitting administrator who instituted the investigation of a city policeman to make the ultimate disciplinary decision in the matter); *DeSarno v. Department of Commerce* (Fed.Cir. 1985) 761 F.2d 657, 660 (supervisor who proposes termination of an employee is permitted to conduct full, impartial review of the matter and to make the final decision so long as the employee receives notice of the charges, an explanation of the employer's evidence and an opportunity to present his side of the story); *Frumkin v. Board of Trustees, Kent State* (6th Cir. 1980) 626 F.2d 19, 21-22 (no due process violation in having a university president, who had decided to dismiss a tenured professor, override the recommendation of a hearing committee not to terminate the professor's employment); and *Beard v. General Services Admin.* (Fed.Cir. 1986) 801 F.2d 1318, 1323 (there is no constitutional requirement that an administrative panel reviewing agency disciplinary actions must independently select a penalty it feels is appropriate for the misconduct charged).

The cited federal decisions support the distinction between the due process required in a judicial proceeding and that required in an administrative hearing. This is a distinction which applies in the instant case. The proceeding involved here is an administrative and not a judicial proceeding, and the relevant federal decisions we have cited do not support respondents' contention

that a panel reviewing a departmental disciplinary decision must be able to override the department's selection of what it believes is an appropriate penalty.

What *is* owing to the disciplined employee is the right to have the reviewing body determine whether there is sufficient evidence to uphold the charges of misconduct. Section 112 provides for this type of review. Section 112 also permits the board reviewing the matter to render what amounts to an advisory opinion regarding imposition of a penalty, once it has determined that there is sufficient evidence to support the grounds for taking disciplinary action. That the reviewing body cannot force its notion of what is an appropriate penalty on the agency does not, without more, offend the federal constitution. The constitution is offended, according to the Supreme Court, by an ultimate decisionmaker who exhibits personal animosity toward the employee or who is financially interested in the outcome of the proceedings. In this appeal, there is no evidence, nor even argument, suggesting that the decisionmaker who ultimately decided the appropriate penalty was in any way biased or improperly interested. Respondents are thus left to argue that the agency officials involved in the decisionmaking process *might* be wedded to their original conclusions, or that the entire process *appears to be* unfair. These speculations are not sufficient to overcome the presumption that public officials will act fairly and conscientiously in discharging their duties.

Our analysis of the relevant federal authorities leads us to conclude that the requirement contained in section 112 of the Los Angeles city charter that the Board obtain the consent of a disciplined employee's departmental chief before reducing the level of the employee's punishment does not violate the minimum due process guarantees of the federal constitution.

b. Analysis of State Law

Though the wording of the California Constitution parallels in part that contained in the federal constitution, the rights guaranteed by the state's constitution are not dependent on those guaranteed by the United States Constitution (Cal. Const., art. I, § 24). The scope of rights secured to the people of California by their constitution are to be determined by the state courts, "informed but untrammelled by the United States Supreme Court's reading of parallel federal provisions." (*Reynolds v. Superior Court* (1974) 12 Cal.3d 834, 842.)

Our Supreme Court has said that procedural due process in an administrative setting requires notice of the proposed action; the reasons therefor; a copy of the charges and materials on which the action is based; and the right to respond to the authority initially imposing the discipline "before a reasonably impartial, noninvolved reviewer." (*Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 736-737.) The court has found that allowing a single decisionmaker to undertake both the investigative and the adjudicative functions in an administrative proceeding does not, by itself, constitute a denial of due process. (*Griggs v. Board of Trustees* (1964) 61 Cal.2d 93, 98.)

Rather, as in the federal courts, our Supreme Court requires a party seeking to show bias or prejudice on the part of an administrative decisionmaker to prove the same with concrete facts: " 'Bias and prejudice are never implied and must be established by clear averments.' [Citation.] Indeed, a party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals." (*Andrews v. Agricultural Labor*

Relations Bd. (1981) 28 Cal.3d 781, 792; accord *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 910-911; *American Isuzu Motors, Inc. v. New Motor Vehicle Bd.* (1986) 186 Cal.App.3d 464, 472-473.) The court added, "[O]ur courts have never required the disqualification of a judge unless the moving party has been able to demonstrate concretely the actual existence of bias. We cannot now exchange this established principle for one as vague, unmanageable and laden with potential mischief as an 'appearance of bias' standard, despite our deep concern for the objective and impartial discharge of all judicial duties in this state. [¶] The foregoing considerations, of course, are equally applicable to the disqualification of a judicial officer in the administrative system. Indeed, the appearance of bias standard may be particularly untenable in certain administrative settings." (*Andrews v. Agricultural Labor Relations Bd., supra*, 28 Cal.3d at pp. 793-794.) In a footnote, the court observed that there were some situations in which a decisionmaker should be disqualified because of the "probability" of bias, such as when he has a personal or financial interest in the outcome, or is either familially [*sic*] or professionally related to the litigant. (*Id.* at p. 793, fn. 5.)

Thus, it appears that the highest court of this state construes the state constitution's due process guarantee of a fair and impartial administrative decisionmaker in the same manner as the federal courts have interpreted parallel provisions in the federal constitution. In other words, mere involvement in ongoing disciplinary proceedings does not, per se, violate due process principles. Those principles are violated, conversely, if the official or officials who take part in the proceedings are demonstrably biased or if, in the least, circumstances such as personal or financial interest strongly suggest a lack of impartiality. Our Supreme Court has emphatically rejected the notion that a subjective "appearance of

bias" is enough to taint an entire legislatively created system of handling disciplinary matters.

The California intermediate appellate decisions relied upon by respondents are distinguishable. In *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, the court found a lack of procedural fairness where nearly one-half of the members of the panel reviewing a decision to suspend a physician's staff privileges were also members of the committee which had made the original suspension decision. That is not the case here: there is nothing in the record suggesting that there is an overlap between the departmental officials responsible for Godino's and Burrell's punishment and the members of the Board which reviews the sufficiency of the grounds for the discipline imposed by the departmental officials. In *American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983, the court arrived at the "unavoidable" conclusion that "dealer-members of the Board have an economic stake in every franchise termination case that comes before them." (*Id.* at p. 987.) The court reached the same conclusion in *Nissan Motor Corp. v. New Motor Vehicle Bd.* (1984) 153 Cal.App.3d 109. Respondents have offered no such evidence of a financial interest by either the departmental officials or the Board in the outcomes of the disciplinary proceedings at issue here.

A number of the cases relied upon by the trial courts are likewise inapposite. In *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, the disciplined city employees were dismissed "summarily without any predismissal procedures." (*Id.* at p. 196.) The Supreme Court found that this was improper, because the terminated employees had a property interest in their continued employment, which required, in the least, some sort of hearing to determine

the nature and extent of the appropriate disciplinary action. (*Id.* at p. 208.) Here, by contrast, neither Godino nor Burrell were "summarily" dismissed or suspended. Indeed, the transcript from the Godino matter indicates that Godino was given a hearing and an opportunity to refute the charges before a "*Skelly* hearing committee" within his department.[4] It was that committee's decision which led to his appeal to the Board.

The case of *Mennig v. City Council* (1978) 86 Cal.App.3d 341 contains facts somewhat similar to our own, but is distinguishable on several grounds. In *Mennig*, a city procedural rule permitted disciplined employees to appeal their punishment to a municipal civil service commission. The commission could make recommendations which could be overruled by a unanimous vote of the city council. A local police chief, Mennig, became embroiled in a political dispute with the city council, which then voted to dismiss him. Mennig appealed to the municipal civil service commission, which found that none of the charges against him were supported by substantial evidence and recommended that he be reinstated. The city council disapproved of the commission's findings and refused to reinstate Mennig, prompting him to seek a writ of mandate. In the court of appeal, Division One of this District acknowledged that an administrator's prior knowledge of the facts bearing upon his decision, or even his prehearing expression of opinion on the result does not, of itself, disqualify him from acting on a matter. (86 Cal.App.3d at p. 350.) Citing *Withrow v. Larkin, supra*, 421 U.S. 35, the court found that, on the other hand, the administrative

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[4] Referring to *Skelly v. State Personnel Bd., supra*, 15 Cal.3d 194, giving permanent public employees the right to a pretermination hering [*sic*].

decisionmaker in the case before it — the city council — should be disqualified because its members were "personally embroiled in the controversy with Mennig" and "if not fighting for their collective political lives, were nevertheless impelled to seek vindication. They in fact did so in their resolution increasing the penalty against Mennig by recording as true facts to which they had testified [those] which the commission had found to be unsubstantiated." (86 Cal.App.3d at p. 351.)

There are thus at least two distinguishing factors in *Mennig*: first, the administrative appellate panel found that the charges against Mennig were unsubstantiated, and second, the ultimate decisionmaker was obviously biased with personal animosity toward the disciplined employee. Neither of those factors are present in our case. We note that the court in *Mennig* was not troubled by the city's system per se, even though that system permitted the city council which had originally dismissed the employee to make the ultimate decision overruling the civil service commission's findings and recommendations. What troubled the court was the ultimate decisionmaker's demonstrable bias, which is constitutionally unacceptable.

The trial courts in this consolidated appeal, though undoubtedly well-intentioned, should not have invalidated a legislatively created system merely because they believe city employees should be given more procedural process than they are constitutionally due. The record reflects that the trial judges here misperceived the purpose of the administrative appeal. The purpose of the administrative appeal is to ensure that an employee has not been disciplined by his department supervisors for trivial or invidious reasons. The Board accomplishes this task by independently reviewing the sufficiency of the evidence supporting the charges against the employee. If it finds an inadequate basis for

the charges, and that the employee is fit to fill his position, the Board is *required* by section 112 to reinstate the disciplined employee. The only limitation on the Board's powers occurs after it has already determined that the charges against the employee are substantiated. At that point, the local legislature has decided that the department itself may be better equipped than the Board to determine an appropriate penalty, presumably consistent with the penalties it has imposed in the past for similar misconduct in countless other cases. (See *Beard v. General Services Admin., supra*, 801 F.2d 1318, 1321-1322.) This procedure should not be invalidated because there could possibly be some undocumented and unproved bias in the ultimate decisionmaker. The Supreme Courts of the United States and this state require more than this as a reason for declaring legislation unconstitutional on due process grounds.

2. Equal Protection

Respondents contend that the city provides what they consider to be "more protection" to sworn firemen and police officers because charter sections 135 and 202 (unlike section 112, subdivision (a)) prevent Police and Fire Department managers from imposing a greater disciplinary penalty than that recommended by the Board of Rights to which disciplinary decisions are appealed.[5]

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[5] Much like section 112, section 135 provides that officers and employees of the Fire Department may only be disciplined "for good and sufficient cause" after a full hearing before a Board of Rights. The Board of Rights is comprised of three high ranking Fire Department chiefs, none of whom are permitted to sit if they were material witnesses to the misconduct charged. Section 202 is virtually identical to section 135, except that it applies to the Police Department. Section 112, subdivison (b) states that the procedures prescribed by section 112, subdivision (a), which we have discussed

(continued)

This leads respondents to conclude that the treatment given to policemen and firemen, because it differs from the treatment afforded to all other civil service employees, amounts to a denial of equal protection. Judge Deering rejected this contention, and so do we.

Respondents erroneously announce that the city's differing treatment of policemen and firemen is subject to strict scrutiny and can only be justified by a compelling government interest because a "fundamental right to due process" is implicated. Our Supreme Court has considered and rejected a similar contention, observing that it "appears to rest upon an assumption that whenever a 'property' or 'liberty' interest is accorded the protections of procedural due process, that interest becomes a 'fundamental constitutional right' so that legislative measures regulating such an interest are necessarily subject to strict scrutiny. This assumption is totally unfounded. Recent decisions have established that the whole panoply of ordinary property rights are generally protected from summary termination or deprivation by procedural due process [citations] but no case has even remotely suggested that the constitutionality of substantive legislative measures regulating or restricting such 'protected property' rights are to judged [*sic*] under a 'strict scrutiny standard.' " (*Hernandez v. Department of Motor Vehicles* (1981) 30 Cal.3d 70, 81.) Rather, we must presume that the legislation creating the classification is constitutional, and determine only whether the distinctions drawn bear some rational relationship to a conceivable legitimate state purpose. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 16.) In other words, the

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(ftn. continued)
at length above, apply to all Police and Fire Department employees except those who are sworn to perform the duties of regular police officers and firemen.

classification must be found to rest upon "some reasonable differentiation fairly related to the object of regulation." (*Hays v. Wood* (1979) 25 Cal.3d 772, 787.)[6]

Although the city has not deigned to provide us with one, we can nonetheless conceive of a legitimate government purpose for the distinction between firemen and policemen and other municipal civil service employees. Unlike most other Los Angeles civil service employees, policemen and firemen are responsible for ensuring the physical safety of the city's citizenry. This responsibility not only embodies a far higher level of public trust, but also requires these officers to make split-second life-and-death decisions in the course and scope of their employment. Thus, they are obliged to function more independently than, for example, an employee of the Department of Parks and Recreation or municipal construction worker, with far less direct supervision. These factors make it imperative for a peace officer or fireman to have alleged misconduct in the line of duty reviewed by officers within his department rather than by an outside administrative review panel whose members would be unfamiliar with the dangers inherent in this type of work.

It is equally reasonable to have this internal review panel set a limit on the penalty which may be imposed by the officer's supervisor (without first obtaining the supervisor's consent): we can conceive of a situation in which a supervisor determines that a fireman should be terminated for refusing to enter a burning building, a determination which is repudiated by members of a

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[6] The case relied upon by respondents, *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, is inapposite. There, the court applied a strict scrutiny analysis because a public employee's fundamental right to privacy was impinged by the defendant's polygraph test requirement. No privacy right is implicated by the legislative classification in this appeal.

reviewing panel who have faced similar circumstances and who believe that the fireman's conduct did not merit such a harsh penalty. The difference between this scenario and that faced by Godino, for example, is that Godino was not confronted with the prospect of losing his life when he decided not to follow departmental money handling procedures. The determination of whether a policeman or fireman acted properly is, in other words, a far more subjective determination than most, therefore it is reasonable and rational for the local legislature to believe that the uppermost penalties for these individuals should be decided by the reviewing panel.

In sum, we find that there is a legitimate government purpose for providing a separate administrative review procedure for regular police officers and members of the fire department, and that this distinction does not violate the equal protection rights of other civil service employees.

DISPOSITION

The judgments of the trial courts in these cases declaring Los Angeles city charter section 112 unconstitutional are reversed. Burrell's "cross-appeal" seeking back pay during the pendency of this appeal is not properly before this court as it concerns a matter not decided by the trial court. Each party to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION.

BOREN, J.

We concur:

LUCAS, P.J.

KENNARD, J.*

Los Angeles Superior Court Case Nos. C633835 and C603176

JERRY K. FIELDS, WARREN DEERING and KURT J. LEWIN, Judges

James K. Hahn, City Attorney, Frederick N. Merkin, Senior Assistant City Attorney, and Robert Cramer, Assistant City Attorney, for Defendants and Appellants.

Marr & Marchant, Cecil Marr and Diane Marchant for Plaintiffs, Respondents and Appellant.

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* Assigned by the Chairperson of the Judicial Council.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

ROGER BURRELL,
Plaintiff and Appellant,
v.
CITY OF LOS ANGELES et al.,
Defendants and Appellants.

2d Civil No. B027696
(Super. Ct. No. C633835)

LOS ANGELES CITY
EMPLOYEES UNION et al.,
Plaintiffs and Respondents,
v.
BOARD OF CIVIL SERVICE
COMMISSIONERS,
Defendants and Appellants.

(Super. Ct. No. C603176)

ORDER MODIFYING OPINION

THE COURT:

It is ordered that the opinion filed herein on April 10, 1989, be modified as follows:

1. Page 24, footnote 4: Change "hering" to "hearing" in the last line of the footnote.
2. Page 26, third line of full paragraph: Change the phrase "legislative created system" to "system approved by the electorate" so that the first sentence in the full paragraph now reads: "The trial courts in this consolidated appeal, though undoubtedly well-intentioned, should not have invalidated a system approved by the electorate merely because they believe city employees should be given more procedural process than they are constitutionally due."
3. Page 25, fourth line from bottom: Change "legislature" to "electorate" so that the sentence now reads: "At that point, the local electorate has decided that the department itself may be better equipped than the Board to determine an appropriate penalty, . . ."
4. Page 27, sixth line from the top: Change "legislation" to "charter provisions" so that the sentence now reads: "The Supreme Courts of the United States and this state require more than this as a reason for declaring charter provisions unconstitutional on due process grounds."
5. Page 30, third line from bottom: Delete the phrase "for the local legislature to believe" so that the sentence now reads: "The determination of whether a policeman or fireman acted properly is, in other words, a far more subjective determination than most, therefore it is reasonable and rational

that the uppermost penalties for these individuals should be decided by the reviewing panel."

There is no change in judgment.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 5 DATE: 05/09/89

RECEIVED MAY 10, 1989

Loew & Marr
Cecil Marr
3255 Wilshire Blvd.
Suite 830
Los Angeles, CA. 90010

RE: Burrell, Roger
vs.
Los Angeles, City of, Et Al.
2 Civil B027696
Los Angeles, N0. C633835

THE COURT:

Petition for rehearing denied.

APPENDIX B

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE
COURT OF APPEAL

SECOND APPELLATE DISTRICT,
DIVISION FIVE, NO. B027696, S010320

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

RECEIVED JUL 24, 1989
SUPREME COURT
FILED
JUL 20, 1989
Robert Wandruff, Clerk

ROGER BURRELL, Appellant
v.
CITY OF LOS ANGELES Et Al., Respondents
And Companion Case

KENNARD, J., DID NOT PARTICIPATE.

Appellant's petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted. The requests for an order directing depublication of the opinion in the above-entitled cause are DENIED.

LUCAS
Chief Justice

APPENDIX C

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ORIGINAL FILED
OCT 23, 1988
COUNTY CLERK

LOS ANGELES CITY EMPLOYEES UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 347, A California non-profit corporation; ENGINEERS AND ARCHITECTS ASSOCIATION, an unincorporated association; LOCAL 18, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, an unincorporated association; LOS ANGELES CITY SUPERVISORS AND SUPERINTENDENTS ASSOCIATION, a California non-profit corporation; and RICHARD A. GODINO,

Plaintiffs,

vs

BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; an agency of the municipal corporation; CITY OF LOS ANGELES, a municipal corporation; and JAMES E. HADAWAY, in his official capacity of General Manager of the Department of Recreation and Parks of the City of Los Angeles,

Defendant.

CASE NO. C603176

STATEMENT OF DECISION

I. Plaintiffs' complaint seeks two types of relief:

a. Declaratory relief, and

b. A peremptory writ of mandate under CCP §§1094.5 and 1085.

II. On the present motion, the Court shall consider and rule upon only the requested relief under CCP §§1094.5 and 1085. The declaratory relief aspects of this case must be subsequently tried in the appropriate trial department.

III. Standing of named Plaintiffs

a. Only Richard A. Godino has standing to seek review under CCP §1094.5 of the action of defendants in suspending him for ten days from his civil service employment.

b. The remaining plaintiffs are associations and they have not stated a cause of action for relief as to Godino's action under CCP §1094.5, but they have stated in their own behalf a cause of action under CCP §1085.

IV. Applicability of CCP §1085 to Plaintiff Godino

a. Plaintiff Richard A. Godino.

Review of the adjudicatory action of defendants is confined to CCP §1094.5 as the exclusive means of review. CCP §1085, ordinary mandamus, is not available for such review.

V. Relief as to Unnamed Plaintiffs

a. Plaintiff associations seek to set aside the suspension of any member of plaintiff organizations suspended

prior to 90 days to the filing of the compaint [*sic*] (Complaint, page 14, Paragraph C).

b. Plaintiffs lack standing to represent such unnamed employees in this proceeding. No cause of action has been stated by plaintiffs to review suspensions of unnamed employees.

c. Suspension imposed on employees not named as plaintiffs must be reviewed pursuant to CCP §1094.5 in an action filed by the affected employees themselves. The Court can only review the propriety of disciplinary action based on the record of administrative proceedings affecting the particular employee. No such record has been presented by plaintiff associations.

VI. Legal and Factual Basis for Court's Decision as Requested by Plaintiffs' Written Request Filed 9/25/86 REQUEST NO. 1

1. The Charter Provision

(a) Los Angeles City Charter Section 112 provides for an administrative investigation before the Civil Service Commission (hereafter "Commission") for any civil service employee (except policemen and firemen) removed, discharged or suspended for more than five days. The term "investigation" in the Charter appears to have been interpreted by the City to mean a trial type hearing. The Commission is granted authority to restore such employee to his position if the grounds for disciplinary action are not sustained. However, if the ground or grounds of discipline are upheld, the Commission may not reduce the suspension or other penalty without consent of the employee's appointing authority.

(b) Due Process Requirements

(1) It is well established under due process requirements a civil service employee may not be subjected to termination or a significant suspension without the opportunity for a hearing. *Civil Service Assn. v. City, etc. of S.F.*, 22 Cal.3d 552, 560; *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694; *Arnett v. Kennopf*, 416 U.S. 134, 94 S.Ct. 1633; *Skelly v. Personnel Bd.*, 15 Cal.3d 194, 206; see generally Van Alystne, 62 Cornell Law Review at page 487. It is further established that such a hearing must be before an impartial official or tribunal, *Skelly v. State Personnel Board, supra*, page 208 and that an official involved in the initial determination to institute disciplinary proceedings should not participate in the decision making. *Mennig v. City Council*, 86 Cal.App.3d 341, 381. Where the appointing authority has discretion to impose varying penalties, the right to a hearing, even on undisputed facts, includes the right to present evidence on the issue of severity of the penalty. *Inter. Brotherhood, etc. v. City of Gridley*, 34 Cal.3d 191, 208, 209.

(2) The combining of investigative and adjudicatory functions does not, without more, constitute a due process violation. However, this does not preclude a court from determining from the special facts and circumstances that the risk of unfairness is untolerably high. *Withrow v. Larkin*, 421 U.S. 35, 58, 95 S.Ct. 1456, 1470. A fair hearing presupposes an impartial trier of fact and prior official involvement in a case renders impartiality most difficult to maintain. *Wasson v. Trowbridge*, 382 F.2d 807, 813; see also *Twigger v. Schultz*, 484 F.2d 856 (violation of federal APA); cf. *Overlook Nursing Home Inc. v. U.S.*, 556 F.2d 500, 503. See generally Davis, Administrative Law. Vol. 4, Section 33.02[3]. Not only is a biased decision constitution-

ally unacceptable but our system has always endeavored to prevent even the *probability* of unfairness. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 628.

Neither Charter Section 112 nor the civil service regulations (see Petitioner's Memo, page 8) requires the appointing authority to review the entire administrative record of the hearing conducted by the examiner (or by the Commission itself) before deciding to consent to or object to the Commission's recommended reduction of a penalty. The California APA (Government Code Sections 11500, et seq.) does not apply here. It is noteworthy, however, that under APA Section 11517 an agency may reduce a penalty proposed by a hearing officer without reading the administrative record but it may not *increase* the penalty recommended unless the agency reads the entire record. By contrast, here the agency (i.e., appointing authority) under Charter Section 112 has a sort of "lateral" review whereby it may veto any reduction of the penalty of the Civil Service Commission without consideration of all of the evidence adduced before the examiner and the Commission. Indeed, there are no rules or guidelines as to what the appointing authority may or must consider in reaching its veto. Without such standards there is no prohibition against the appointing authority seeking advice from those subordinates who were involved in the investigation or in the filing of the charges. While under some circumstances, an agency may use advice of subordinates before it reached its decision (*Chosick v. Reilly*, 125 Cal.App.3d 334, 335), the consideration by the agency of evidence not adduced at the adjudicatory hearing denies the accused a fair hearing. (*English v. City of Long Beach*, 35 Cal.2d 155, 159.)

What inquiry of subordinates was made by the appointing authority in the instant case and what factors motivated the appointing authority to refuse to consent

to the reduction of Mr. Godino's suspension is not disclosed by the record. The record does show that after the examiner had conducted the hearing and filed a proposed decision, the appointing authority's general manager, Mr. Hadaway, did appear and argue before the Commission itself about matters which were clearly outside the record made before the examiner. (See Administrative Transcript, page 176, et seq.) What other matters, if any, the appointing authority considered in vetoing any penalty reduction is not disclosed by the record. All of these circumstances indicate a high probability of unfairness. *In re Murchison, supra*, 349 U.S. 133, 136, 75 S.Ct. 623, 628.

While it may be argued that judicial review under CCP §1094.5 (under the independent judgment test) may remove any procedural unfairness (see *Yankee v. St. Dept., et al.*, 162 Cal.App.2d 600, 603), the trial court has a very limited function in reviewing penalties if the evidentiary findings are supported by the evidence. (See *Martin v. ABC, etc.*, 52 Cal.2d 287, 298; *Cadillo v. Bd. of Med. Exam.*, 26 Cal. App.3d 961, 968, [clear abuse of discretion standard]. Thus, petitioner Godino is not entitled to an independent weighing of the propriety of the penalty by the Court.

(3) It is apparent that Charter Section 112 effectively restricts the Commission from fully adjudicating the question of the severity of the penalty. The result is that the very agency (i.e., appointing authority) that initially ordered the disciplinary action has, in effect, the right to determine without considering the entire record what the ultimate penalty should be. No adversial evidentiary hearing is granted on the question of severity of the penalty. The participation of the appointing authority post hearing in the penalty determination deprives the employee of a fair hearing where, as here, the appointing authority may be relying

on matters outside the record or, at least, does not review the entire administrative record. See *Civil Service Com v. Redevelopment Agency*, 166 Cal.App.3d 341, 351. As applied to petitioner, those provisions of Section 112 of the Charter requiring consent of the appointing authority before the Commission may reduce the penalty are invalid as depriving petitioner of procedural, if not substantive, due process.

REQUEST NO. 2

Charter Section 112 does not fulfill the requirements of procedural due process for reasons set forth in Request No. 1 above.

REQUEST NO. 3

The equal protection clause does not require the City to provide the "same" due process protection to non-sworn employees as it does to police and firemen. As to latter categories of employees, they are distinct because of their role in public safety. See generally, *Long Beach City, etc. v. City of Long Beach*, 41 Cal.3d 937.

REQUEST NO. 4

Petitioner Godino has been denied due process in the imposition of a 10-day suspension without pay for reasons stated under Request No. 1 above.

REQUEST NO. 5

Petitioner Godino's appropriate remedy is an order remanding the matter to the Civil Service Commission for that tribunal to consider, consistent with this State-

ment of Decision, the propriety of the penalty of a 10-day suspension without pay in light of the evidence adduced in the proceedings held before the hearing examiner and any additional evidence the Commission may elect to receive.

REQUEST NO. 6

Other employees represented by the plaintiff organzations [*sic*] herein are not entitled to any relief under the CCP §1094.5 portion of this case because the employees themselves are not petitioners and the present petition does not disclose what actions were taken against such employees and no record of the administrative proceeding has been submitted.

REQUEST NO. 7

Other employees may seek relief under CCP §1094.5 by filing a petition for writ of mandate on their own behalf.

REQUEST NO. 8

As to the CCP §1094.5 action and CCP §1085 action, the Court finds plaintiff Godino and plaintiff associations are entitled to attorney's fees under CCP §1021.5. Attorney's fees are denied under Government Code section 800 for the reason defendants did not act arbitrarily but were merely following their duty as required by Charter Section 112.

VII. Relief Granted to Plaintiff Godino Under CCP §1094.5

A. Defendant Board of Civil Service Commission denied Petitioner Godino a fair trial within the meaning of CCP §1094.5(b) in that he was deprived of full hearing on the severity of the 10-day suspension without pay, as more particularly set forth in Paragraph VI hereinabove. Petitioner does not challenge the sufficiency of the evidence establishing grounds for some form of discipline. Therefore, petitioner is not entitled to any other relief under CCP §1094.5.

VIII. ORDERED

1. A peremptory writ of mandate pursuant to CCP §1094.5(b) shall issue as to the 10-day suspension imposed upon plaintiff Richard A. Godino commanding defendant Board of Civil Service Commissioners to determine whether his suspension should be reduced. In making this determination said Board may consider but shall not be bound by the lack of consent of the appointing authority.

2. A peremptory writ of mandate shall issue under CCP §1085 in favor of the plaintiff associations commanding the Board of Civil Service Commissioners to consider but not be bound by the lack of consent of the appointing authority on any penalty it deems appropriate in civil service disciplinary proceedings.

3. To enable respondents to pursue a prompt appeal, the Court has considered severing the CCP §1085 and CCP 1094.5 causes of action from the remaining request for declaratory relief which remains pending. However, this procedure does not appear appropriate since the declaratory relief action involves the same issues as

those in the mandate causes of action. See generally, Witkin, California Procedure (3rd Ed.) Vol. 9, page 163.

Dated: October 22, 1986

/s/ WARREN H. DEERING
WARREN H. DEERING
Judge of the Superior Court

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SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

LOS ANGELES CITY EMPLOYEES UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 347, A California non-profit corporation; ENGINEERS AND ARCHITECTS ASSOCIATION, an unincorporated association; LOCAL 18, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, an unincorporated association; LOS ANGELES CITY SUPERVISORS AND SUPERINTENDENTS ASSOCIATION, a California non-profit corporation; and RICHARD A. GODINO,

Plaintiffs,

vs.

BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; an agency of the municipal corporation; CITY OF LOS ANGELES, a municipal corporation; and JAMES E. HADAWAY, in his official capacity of General Manager of the Department of Recreation and Parks of the City of Los Angeles,

Defendants.

CASE NO. C 603 176

JUDGMENT GRANTING DECLARATORY RELIEF

Date: January 9, 1987
Dept: 84

This matter came before this Court as a result of a motion for summary judgment regarding a claim for declaratory relief (pursuant to CCP §§437(c) and 1060), and a motion for attorney fees (pursuant to CCP §1021.5). It was heard on January 9, 1987, in Department 84 of Superior Court, the Honorable Kurt J. Lewin, Judge presiding. Cecil Marr appeared as attorney for the Plaintiffs and the moving parties, and the Defendants were represented by the Office of the Los Angeles City Attorney and Assistant City Attorney Robert Cramer.

In ruling on the motion, the Court considered the "Separate Statement of Facts in Support of Motion for Summary Judgment" filed by the Plaintiffs on November 19, 1986; the documents submitted as the "Administrative Record in Support of Complaint for Extraordinary Relief . . ." (filed June 10, 1986); and the "Declaration of Sylvia Trowbridge Verifying Official Documents of the Board of Civil Service Commissioners" (filed July 9, 1986). The facts set forth in those documents were not controverted by Defendants. Pursuant to a "Stipulation Re Documents Submitted as Evidence by the Plaintiffs" (filed on or about January 7, 1987), the Court considered those documents and exhibits as if they were "originals".

Based upon the evidence in the file of this matter and the arguments of counsel, the Court finds that the Plaintiffs are entitled to summary judgment, because this action presents no triable issues of fact; and that the Plaintiffs are entitled to judgment as a matter of law.

The Court finds that the Plaintiffs are entitled to declaratory relief for the reasons set forth in Request No. 1 of Judge Warren H. Deering's Statement of Decision (filed October 22, 1986). It is apparent from Charter §112 on its face, and, alternatively, it is apparent from the consistent application of that provision by the Board of Civil Service Commissioners, that there remains too great a probability of unfairness, and too great a probability of actual bias on the part of the appointing authority for that provision to be constitutionally tolerable without severing the phrase "with the consent of the appointing authority".

Therefore, this Court finds that the inclusion of the phrase "with the consent of the appointing authority" in Charter §112 results in violation of state and federal constitutional due process, and that it is inconsistent with the provisions of CCP §1094.5; and that such phrase is severable from Charter §112. Further, this Court finds that the Plaintiffs are entitled to attorney fees pursuant to CCP §1021.5 in an amount to be determined by noticed motion to be filed after judgment in any appeals of this action.

Based on the foregoing and the reasoning set forth in "Request No. 1" of Judge Deering's Statement of Decision, the Court ordered the following:

IT IS HEREBY ADJUDGED, ORDERED AND DECREED:

1. That any administrative decision of the Board of Civil Service Commissioners, City of Los Angeles, which gives any effect to the language "with the consent of the appointing authority" is inconsistent with state and federal consitutional [*sic*] due process and with CCP §1094.5;

2. That the language "with the consent of the appointing authority" is severable from Charter §112, and that such language is hereafter severed from that section and is without effect;

3. That in assessing the amount of penalty (suspension or discharge) to be imposed against an employee or former employee utilizing the appeal procedure of Charter §112, the Board of Civil Service Commissioners must adjudicate such penalty by applying its own judicial discretion; that in adjudicating each such appeal, it must render a decision on the extent of penalty which is "final and conclusive"; and that such Board may not give any effect to the consent or lack of consent to such penalty by any appointing authority;

4. That the writs of mandate, pursuant to CCP §1085 and CCP §1094.5, previously ordered by Judge Deering, be issued in a form approved by Judge Deering;

5. That the Plaintiffs are entitled to attorney fees pursuant to CCP §1021.5; that the amount of those attorney fees shall be established by motion filed on the Court's normal motion calendar; and that such motion shall be filed within sixty days of the signing of this judgment unless there is an appeal by any party to this action. In the event of an appeal, such motion shall be filed within sixty days of the issuance of a remittitur by the Court of Appeal returning this action to the Superior Court;

6. Plaintiffs are entitled to costs against Defendants pursuant to the filing of a Memorandum of Costs and Disbursements, in the sum of _____.

Dated: May 15, 1987

/s/ Kurt Lewin
JUDGE, SUPERIOR COURT

APPENDIX D

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 85 HON. JERRY K. FIELDS,
JUDGE

BURRELL, ROGER,
PLAINTIFF,
vs. NO. C633835
LOS ANG CITY-ETC-ET AL,
DEFENDANTS.

REPORTER'S TRANSCRIPT ON APPEAL
MARCH 30, 1987

APPEARANCES:

FOR THE PETITIONER: CECIL MARR

FOR THE RESPONDING PARTY: JAMES K. HAHN
CITY ATTORNEY
BY: ROBERT CRAMER,
ASSISTANT

LAURENE KELLY, CSR #4514
OFFICIAL REPORTER

COPY

Los Angeles, California; Mon 30 Mar, 1988; 10:24 AM

DEPARTMENT 82 HON. JERRY K. FIELDS, JUDGE

APPEARANCES:

CECIL MARR for the Petitioner; ROBERT CRAMER for the Responding Party.

(LAURENE KELLY, Official Reporter.)

THE COURT: Number — Whatever Roger Burrell is. Number 17.

Come forward.

A Voice: We're on 15, Your Honor.

THE COURT: 15.

THE VOICE: I thought 15 was after 14.

THE COURT: 15. Let's do 15 first. It's shorter.

(The Court heard another matter.)

THE COURT: Roger Burrell versus City of Los Angeles, Number 17.

MR. MARR: Cecil Marr on behalf of the petitioner, Your Honor.

MR. CRAMER: Robert Cramer, C-R-A-M-E-R, Assistant City Attorney, for responding party.

THE COURT: In this matter the moving party requested a Statement of Decision.

The court's Statement of Decision will appear in the transcript of the — official transcript of the court proceedings herein, and the court will order the reporter to prepare an original and two copies at county expense.

This is a Petition for a writ of mandate under CCP 1085 wherein the petitioner moves this court to hold that the Los Angeles City Charter Section 112 is unconstitutional because it fails to fulfill the requirements of due process.

Petitioner contends that the charter limits the authority of the Board of Civil Service Commissioners to review the penalty of discharge imposed upon the petitioner by the General Manager of the Community Development Department.

Is that correct? Is that your position?

MR. MARR: I'm sorry. I missed the last sentence, Your Honor. I contend that the —

THE COURT: The petitioner contends that the charter limits the authority of the Board of Civil Service Commissioners to review the penalty of discharge imposed upon petitioner by the General Manager of the Community Development Department.

MR. MARR: In a sense it does. It limits the ability of the person to get a full due process hearing on the —

THE COURT: I understand that. Petitioner contends that such limitation is caused because Charter Provision 112 provides, among other things, that, quote, consent of the appointing authority, end quote, is required for the Board to redress the punishment imposed by the department head who is the appointing authority, period.

That's the issue before me.

The court's tentative decision is to grant the writ. I will read into the record my Statement of Decision.

Let me first state that this same issue was recently, as both of you well know, considered by Judge Warren Deering of this court in the case of Los Angeles City Employees Union, et al. versus the Board of Civil

Service Commissioners of the City of Los Angeles, et al., L. A. Superior Court Case Number C603176.

I have read Judge Deering's Statement of Decision, which the moving party was kind enough to provide to me in his points and authorities, and the exhibits attached to them, I should say.

I agree entirely with Judge Deering's Statement of Decision on this issue and I adopt it as it relates to the issue of due process in relation to Charter Provision 112.

I have asked permission of Judge Deering to do so. I did and did receive his permission.

I have read the respondent's points and authorities. This case was very well briefed. Both sides did an outstanding job.

Want me to read the whole thing in before I let you argue or —

MR. CRAMER: Please, Your Honor.

THE COURT: In reaching the — to continue, the appointing authority here is the General Manager of the Community Development Department of the City of Los Angeles, who ordered petitioner to be terminated from his employment as a rehabilitation construction specialist number one.

In reaching its decision this court expresses no opinion as to whether the punishment of discharge rendered to the petitioner was proper. This court is concerned only with the question relating to whether petitioner was and can be afforded a fair and impartial hearing on the issue of whether or not he was properly discharged by the department head.

To give the person who ordered petitioner to be terminated the final review as to whether or not such punishment should be modified is to deny petitioner due

process, for on its face such procedure prevents a fair and impartial hearing.

Where the appointing authority has discretion to impose varying penalties, the right to a fair hearing includes the right to present evidence on the severity of the penalty.

A fair hearing presupposes an impartial trier of fact. Prior official involvement in a case by a person who has the final decision renders impartiality difficult if not impossible to obtain.

Charter Section 112 gives the Board of Civil Service Commissioners the right to modify the penalty but only with the consent of the appointing authority which initially imposed the penalty. This on its face deprives the petitioner of a fair hearing.

In addition there are no rules or guidelines as to what the appointing authority may or may not consider in reaching his veto of the Board's decision regarding the penalty. He or she may rely on evidence not produced at the adjudication hearing. This in itself prevents — affects — affects the right to a fair hearing for the accused.

Section 112 has — Section 112 in regard to this veto is unconstitutional, for any hearing conducted pursuant to its terms will result in a denial of due process.

Petitioner is entitled to a full and fair due process hearing from the city in connection with his discharge. Since he cannot obtain such a hearing under the terms of Charter Section 112 and the Charter provides for no other hearing procedure, it would be a useless act for the Board to convene a hearing on the question of petitioner — on the question of whether petitioner was properly discharged, that is, it would have been a useless act.

Since the law abhors useless acts, this court finds that a hearing, if held pursuant to Charter Section 112, which contains the provision for consent of the appointing authority, is not necessary, and petitioner has therefore exhausted his administrative remedies and is properly before this court.

However, this court holds that the clause calling for consent of the appointing authority is severable from the rest of Section 112, and without such clause said section meets all the requirements of due process. As I will state, order hereinafter the case will be remanded to the Board of Civil Service Commissioners with instructions to schedule a hearing at the earliest possible time, pursuant to the terms of Section 112 of the Charter, disregarding that portion thereof which gives the appointing authority any consent as regards a reduction in the length of a suspension or of a suspension of a removal or discharge.

The last question to be considered in this matter is whether petitioner must be reinstated to his job with payment of all back pay since the date of his discharge, and the answer is yes and no.

The decision of the U.S. Supreme Court in Cleveland Board of Education versus Loudermill, a 1985 case, 105 Supreme Court 1487, requires that before a tenured and public employee — I would assume that Mr. Burrell would be in that position, although tenure is not the quite proper word, but it's a similar kind of position — before a tenured public employee who receives only a summary hearing prior to discharge may be removed from his position he must have the right to a full due process hearing, even if held subsequent to discharge.

Until this time no such hearing was available. However, based upon this court's decision and that of Judge Deering, a full due process hearing is now available.

It is no loner necessary that petitioner be reinstated to his position pending such a hearing. However, up to this time it didn't exist and he must be paid all back pay during the period where no such due process hearing was available, which would mean he must be paid from the date of his discharge to the date of this writ, the date of the signing of this writ.

The case is remanded to the city.

It is the intention of this court to remand the case to the City of Los Angeles, and the Board of Civil Service Commissioners are ordered to conduct a hearing on the propriety of petitioner's discharge, which shall include the issue of the extent of the punishment, period.

The Board in reaching its decision is not to be bound by the lack of consent of the appointing authority on any penalty it deems appropriate in the civil service disciplinary proceeding.

Further petitioner is to receive back pay from the city from the date of his discharge to the date of issuance of the writ.

However, pending any decision by the Board of Civil Service Commissioners, he need not be reinstated to his former position, as there will now be a due process proceeding in place.

And the last issue is the issue of the petitioner's right to attorneys fees. And the court finds that petitioner is entitled to fees under CCP 1021.5.

However, it's the intention of the court to set a hearing on that issue concerning the amount on a date which is convenient to all parties and to set forth, provide for a pleading schedule in connection there with. Okay?

Now let me hear from respondent if you desire.

MR. CRAMER: I would like to respond at some length.

One brief question, however. I wasn't clear on one point. Reinstatement has not been ordered.

THE COURT: Correct.

MR. CRAMER: But back pay has been ordered up until today.

THE COURT: Right. Well, up until whenever I sign the writ. I assume it should be up to today.

Then — otherwise I have no control over the writ, that is, no control over when it's presented for signature.

MR. CRAMER: We have a number of problems.

First of all, much of the court's ruling this morning has been based upon a proposed Statement of Decision by Judge Deering in some related litigation —

THE COURT: Correct.

MR. CRAMER: — Involving an individual petitioner named Godino.

THE COURT: Correct.

MR. CRAMER: G-O-D-I-N-O.

And a number of unions in support of the —

THE COURT: Correct. I think Judge Deering stated it in his Statement of Decision very clearly and that every sentence was annotated.

MR. CRAMER: Yes. It is not, however, a decision by Judge Deering yet. It is tentative in nature. It depends upon a number of other events occurring.

First of all we have related litigation. Within the same litigation we have a Motion for Summary Judgment in connection with declarative relief.

THE COURT: I know. There are other things pending which I'm not familiar with.

MR. CRAMER: When all of that is decided and we return to Judge Deering, we would expect further argument at that time and an opportunity to prevail upon Judge Deering to alter his views, and one view in which we would be strongly seeking to respond is that the Godino litigation ought to be limited to the individual plaintiff and the problems of the individual petitioner in that case and the problems that he experienced in the course of his discipline review process.

In it his appointing authority on the record utilized material which was outside the record —

THE COURT: Doesn't make any difference. I utilized Judge Deering's statement, proposed Statement of Decision because it expressed my opinion about this case. I wasn't concerned with the rest of — on the law, expressed my opinion on the law, and that — that opinion isn't changed because that case is not — has not reached a final decision.

I think that keeping — I think that Section 112 as it presently reads is unconstitutional, and I don't think — and I think that that unconstitutionality affects every case.

MR. CRAMER: This will be the first case I'm aware of which so holds, which holds that an appointing authority is powerless to control his own department because he must, he must as a constitutional matter accede to the wishes of some independent or quasi-independent board.

THE COURT: Isn't that the purpose of that, an independent hearing?

MR. CRAMER: Correct. It is up to a petitioner in an individual case to demonstrate, however, the lack of independence on the part of an appointing authority, the existence of bias.

Every case which has found bias has done so on the basis of —

THE COURT: I read your points and authorities on that issue. However, the situation is such where the appointing authority, the general manager, fires somebody.

The Board then hears the matter and says he should not have been fired. Punishment was too harsh. He should have been suspended for a week. Then goes backs [*sic*] to the general manager for his consent.

That is inherently unfair. Inherent.

MR. CRAMER: Case after case in the Supreme Court of the United States, in circuit courts across the country, in federal district courts and state courts across the country have addressed the same situation because it happens every day. It is a traditional method of civil service control.

And it has been found acceptable, constitutionally acceptable in the absence of a showing of bias.

THE COURT: Well, I think bias was inherent in the procedure. I think that the fairness should not have to depend upon luck of having such an outstanding person as general manager to be able to objectively look at it, at the problem, and to view it objectively when that person has already imposed a punishment.

Because when you impose a punishment of termination then you must be definite in your opinion. Something serious must have happened in order for you to believe that somebody should be terminated.

If that is a fact how can you be impartial? Just inherently you cannot.

You might be. Maybe you're one — the general manager is one of those outstanding persons, the

benevolent dictator, who can step back and view this objectively, but the procedure doesn't allow for that.

MR. CRAMER: At the present time the general manager is being asked to do precisely what you are now, what this court is now asking a —

THE COURT: Except this court hasn't fired Mr. Burrell. I don't have any feelings about Mr. Burrell one way or the other. The general manager already does.

MR. CRAMER: I understand that.

Precisely what this court is asking a Board to do, that is, decide the facts and, once it has decided the facts, make a decision on a penalty. That's precisely what the Board is going to be doing —

THE COURT: And that should be binding.

MR. CRAMER: But the court has just gotten through saying that how can one step back objectively from the facts and impose a penalty once one has already decided the facts and firmly believes in their truth and validity.

It's what boards do every day. It's what courts do every day here. It is what authorities do indeed every day in jurisdictions across the land.

THE COURT: Let me put it differently.

Let's assume that I were to try — be the trier of fact in a criminal matter and find somebody guilty. Should I sit on the appellate panel?

MR. CRAMER: No.

THE COURT: Would you consider letting me sit on the appellate panel?

MR. CRAMER: Of course not.

THE COURT: But that's what you're saying is okay for the city.

MR. CRAMER: Yes. I do. And the reason is because we're not dealing with criminal matters. We're dealing here with —

THE COURT: Make it a civil case. A civil case. It doesn't make any difference.

You wouldn't let me sit on it under that circumstance. Nor would anyone else. And it wouldn't be fair for me to do that.

MR. CRAMER: My next point is that what we have asked for in this case is that this case, Mr. Burrell's case, be treated on its own merits without reference to opinions in any other cases. Even if Judge Deering's opinion were final and even if it were correct, there is nothing at all which tells us what procedure is going to be applied in the future to Mr. Burrell.

Mr. Marr doesn't know what procedure's going to be applied to him. I don't know what procedure's going to be applied. The court doesn't.

THE COURT: Well, the court has ordered a procedure.

MR. CRAMER: Correct. What the court is doing is saying on — what I am questioning is the issuance of a writ of mandate in the first instance, because the purpose of a writ of mandate is to correct some — is to compel the responding parties to perform some ministerial act required by law.

What the court can order the city to do perfectly properly is to go forth and give this man due process. It cannot say, however, that that discretion must be exercised in a particular way.

There are any one of 50 boards within the city that could decide this. We could set up independent boards to decide these questions. They're not provided for yet by charter.

We could set up a procedure under which we kept the same essential structure that we have now under Charter Section 112 but instead provided for rules and guidelines which Judge Deering found wanting in the Godino case and which this court has found wanting here.

We could set up those rules and guidelines in such a way that when an individual appeals he goes before a Board of Civil Service Commissioners Hearing Examiner, he is given a full opportunity to present his views as to penalty, he is given — we insure that those views on penalty and any evidence that can support, a full record is made of it and is passed to the appointing authority for ultimate decision.

We make sure that any decision made by the —

THE COURT: It's the appointing authority's participation which makes it all bad and improper.

MR. CRAMER: But the court indicated that one of the reasons for its ruling was the absence of rules and guidelines to limit the appointing authority's discretion. There's no reason why those rules and guidelines can't be provided.

THE COURT: Just another reason why the — I could have easily left that portion out and reached the same conclusion. Just at another reason why the provision is unfair.

MR. CRAMER: The point we are making is how can we take a look at what has happened so far.

And what has happened so far to Mr. Burrell? He has been terminated by an appointing authority pursuant to Skelly procedures and he is awaiting an appeal. We don't know yet what form that appeal will take. At least before we walked in this door this morning.

THE COURT: Correct.

MR. CRAMER: There is nothing the city has done so far which has been contrary to law.

What Mr. Marr objects to and what this court has ruled is that based upon Mr. Marr — Mr. Burrell's speculations about what procedure will be applied, we must not only issue a writ of mandate declaring that what has happened so far is so incorrect and so wrong that back pay must be provided to compensate for it. We're not just going to order you to proceed correctly in the future.

We are going to tell you precisely the way we want you to proceed using precisely what board out of all the myriad of possible ways of imposing due process we're going to select one way —

THE COURT: Let's stop.

The only provision in the Charter to which I have been referred which provides for a hearing in this kind of a situation —

MR. CRAMER: A hearing as to —

THE COURT: Is Section 112, and that section only gives the hearing authority power to the Board of Civil Service Commissioners.

MR. CRAMER: Correct.

THE COURT: No one else has — you have not pointed me to any other provision of the Charter, and therefore I made reference only to that section.

MR. CRAMER: And the Court has held —

THE COURT: As far as I know that's the only section of the Charter which provides for this kind of a hearing.

MR. CRAMER: The court has held that that section is severable, that the remaining portions of the section other than the final authority or the appointing authority are constitutional.

From that the court has said that the Board has ultimate authority over penalty because that's the only way we can have a constitutional disciplinary appellate process, and we are contending that there is no authority at all in the Charter or elsewhere which gives the Board of Civil Service Commissioners or any other Board that power. That power simply cannot be created.

A proper ruling, if the Board — I'm sorry — if the court believes that Charter Section 112 or at least a portion of it is unconstitutional, a proper remedy may well be to order the city to return and devise a procedure which is constitutional.

But what procedure should be devised should be left to the city through its normal governing processes. It is for the city to exercise discretion, not for the court through a writ of mandate to exercise discretion. It is exactly the opposite of what a writ of mandate is for.

THE COURT: In order to do that you would have to have another charter provision.

MR. CRAMER: That is correct. We could do it through another charter provision. We could do it by compromising other systems that we have.

My contention is only is that it is for the city to decide. It is not for the court to exercise discretion. It is for the court to order the parties to exercise discretion.

THE COURT: All right. You may be right in that regard.

MR. CRAMER: Following constitutional lines.

THE COURT: You may be right in that regard.

I have only found a portion of 112 to be unconstitutional. Maybe you are correct, that it should just be returned to the city for the city to —

MR. CRAMER: Determine that procedure which will accord Mr. Burrell due process.

And the second — my final point is the matter of reinstatement and back pay.

The court has ordered us to pay back pay from the date of the discharge until the date of the signing of its order, and yet reinstatement has not been ordered. I'm trying to understand the basis for paying an individual who has not worked, has not been ordered to work —

THE COURT: The basis is the Cleveland Board of Education Case versus Loudermill which says that. It's okay to terminate somebody before you have a hearing, provided there is a procedure in place to have such a hearing.

After Mr. Burrell was terminated there was no —

MR. CRAMER: — That such a procedure is in place today. The procedure that we have in place has nothing whatever to do with the procedure that was in place at the time of the Godino decision and Judge Deering's ruling.

THE COURT: There is no procedure in place, even today, as a matter of fact, even today which would give Mr. Burrell a due process hearing. There is none.

However, if this court retains its ruling in the way — and does rule in the way I've tentatively stated, then there would be a procedure. That procedure is set forth in Section 112; and, if that becomes this court's order, then as of today Mr. Burrell's back salary should terminate. And he would be properly terminated, that is, properly subject to a fair hearing because there would

now be in place a proper procedure for a fair, full, due process hearing.

Section 112 provides for a hearing before the Board of Civil Service Commissioners. That section still is in existence. I haven't affected the — I've only affected one clause therein which I think is to be severable.

If I sent it back to the city to — and order them to provide Mr. Burrell a full, fair, due process hearing, I would assume that they would — the city would utilize the procedures of Section 112, since that's their only authority.

I therefore will leave it as it was, as I stated it.

You don't want to argue against this.

MR. MARR: If I could just be heard briefly on a couple of points.

First of all I assume that you've admitted into evidence the Request for Judicial Notice and those documents which were filed on February 2nd and also the exhibits and the —

THE COURT: Yes, I have.

MR. MARR: With respect to the tentative decision of Judge Deering, I don't believe it was tentative. I believe it was a final Statement of Decision. Only the order is outstanding, and that is because a judgment has not yet been rendered.

With respect to the issue of back pay, I'd invite Your Honor to apply the analogy which was applied after Skelly v. State Personnel Board came down.

There the contention was that predischarge due process had not been accorded; therefore the person had been reinstated. The solution was solved in Barber, B-A-R-B-E-R, v. State Personnel Board in other cases where the courts applying due process after the fact

granted back pay from the period of the discharge until the hearing was finally heard by the Civil Service Commission.

I recognize that your problem here is you're concerned about me delaying a judgment or delaying a writ in getting into your court. I can guarantee that I will get it hand delivered here tomorrow. I would hand deliver a copy to Mr. Cramer. And for that reason I would not hold that process up.

I do believe that it's important, given the city's problem with the procedure that we've been pushing for now for months, that the back pay not terminate until he receives a due process hearing, and the reason is that I expect for one thing the city to appeal this decision.

Now, if they appeal the decision, the court may grant a writ of supersedeas. If they don't, then we are going to be into at least a one-year time frame on an appeal.

Meanwhile Roger Burrell is out without a job, without a due process hearing, and so it seems to me that this court in order to make — to properly apply prior due process hearings has to find that Mr. Burrell as and until the city applies this procedure that this court has found to be appropriate — he has been deprived of property without due process and that, for that reason in this limited case, this Roger Burrell case, he is entitled to back pay from the period of his termination until the time that the Civil Service Commission applies a due process procedure.

If we don't do that, we're going to be in — he is going to continue to be deprived of property without a due process while the city explores other options or decides whether or not it wants a charter amendment or decides whether or not it should appeal this ruling.

So I think that that's the appropriate standard, and I will follow whatever order or directions this court has of me to do whatever ministerial acts that I'm required to do to make sure this matter is handled expeditiously.

There was one further issue, which was the request for interest on back pay, and I assume that this court also contemplated interest and benefits during the period of time.

THE COURT: Let me hear from the city on that issue. Interest and benefits.

MR. CRAMER: Two points as to the — very briefly as to the finality of Judge Deering's Statement of Decision.

It ought to be clear that —

THE COURT: It doesn't make any difference whether it was final. I thought it was properly reasoned and properly stated what the law should be —

MR. CRAMER: I only want to state for the record that I believe — and I'm sure counsel agrees — that each side will have a full opportunity to prevail upon Judge Deering again and in that sense the ruling is in no way final.

THE COURT: It was just simpler for me to adopt his reasoning, his statement as part of my reasoning, because it set forth exactly the way I feel is the proper reason for this case.

MR. CRAMER: Fine.

As to the length of time for which back pay my be appropriate —

THE COURT: I'm going to only do it up to this time and order that an expeditious hearing take place.

MR. CRAMER: We will certainly see to that.

THE COURT: How about interest and benefits?

MR. CRAMER: Mr. — our position is as stated. Mr. Burrell has not been deprived of property without due process at any time.

Counsel's protestations to the contrary are based upon speculation about what our procedure is likely to be. We've no knowledge whatever what procedure is in place as to this particular petition.

We would contend that no benefits are appropriate, no interest is appropriate for property that's been deprived.

THE COURT: Well, I think that — he didn't receive his back pay. If he's going to be paid, then the effect is — I was going to reinstate him, but it wouldn't do any good to reinstate him at this point because he would then be terminated again based upon the ruling; so if he were in effect to be reinstated he should receive benefits.

MR. MARR: Your Honor, if I could correct —

THE COURT: The interest will be awarded on the back pay at the legal rate.

MR. MARR: With respect to reinstatement, reinstatement is the proper remedy, because even if it's reinstate [*sic*] up till the day and he's discharged effective today, because there are —

THE COURT: That is the effect of the ruling, that it is in effect reinstatement up to today.

MR. MARR: Okay. I understand.

Because that does affect such things as seniority and seniority for vacation and benefits.

THE COURT: That's correct.

MR. MARR: Thank you.

THE COURT: All right. The petitioner will prepare the writ and judgment, and I guess you better give notice. Might as well go through everything so you can lay the proper groundwork for an appeal.

MR. MARR: Thank you, Your Honor.

THE COURT: The reporter will prepare an original and two copies of the — of this proceeding, which sets forth among other things this court's Statement of Decision.

MR. MARR: Thank you, Your Honor.

THE COURT: All right.

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SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 85 HON. JERRY K. FIELDS,
JUDGE

BURRELL, ROGER,
PLAINTIFF,
vs. NO. C633835
LOS ANG CITY-ETC-ET AL,
DEFENDANTS.

REPORTER'S CERTIFICATE

State of California)
) ss
County of Los Angeles)

I, Laurene Kelly, Official Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing pages, 1 through 25, comprise a full, true, and correct transcript of the proceedings held in the above-entitled matter, as designated by counsel to be included in the transcript on appeal, reported by me on March 30, 1987.

Dated this 6th day of July, 1988.

/s/ Laurene Kelly, CSR #4514
Official Reporter

CLERK'S CERTIFICATE

State of California)
) ss
County of Los Angeles)

No. C633835

Notice of completion of Reporter's Transcript on appeal in the within-contained matter having been mailed to the attorneys representing the appellant and the respondent, and no request for correction of the transcript on appeal having been filed, and the time for said filing having expired;

Pursuant to Rule 8(a) of the California Rules of Court, I hereby certify that the foregoing record, consisting of ____ pages, is a true and correct transcript on appeal, as designated by counsel.

Dated this ____ day of _____, 19___.

FRANK ZOLIN, County Clerk
and Clerk of the Superior Court
of the State of California,
County of Los Angeles.

By: _____
Deputy

STIPULATION OF COUNSEL

We hereby stipulate that the foregoing transcript on appeal is a true and correct transcript of the designated record on appeal in said action.

Dated this ___ day of _____, 19___.

_____
Attorney for Appellant

Dated this ___ day of _____, 19___.

_____
Attorney for Respondent

JUDGE'S CERTIFICATE

I hereby certify that the foregoing transcript on appeal is true and correct, and the same is hereby settled, allowed, and made a part of the record in this case.

Dated this ___ day of _____, 19___.

_____
Judge

CECIL MARR, a Member of
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Attorneys for Petitioner,
ROGER BURRELL

FILED
APRIL 20, 1987
Frank Zolin, CLERK

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ROGER BURRELL,

Petitioner,

vs.

CITY OF LOS ANGELES, a municipal corporation; DOUGLAS S. FORD, General Manager of the Community Development Department, appointing authority of an agency of the City of Los Angeles; and BOAD OF CIVIL SERVICE COMMISSIONERS, an independent adjudicatory board of the City of Los Angeles,

Respondents.

CASE NO. C 633835

JUDGMENT GRANTING PEREMPTORY
WRIT OF MANDATE

Date: March 30, 1987
Dept: 85

This matter came before this Court as a result of a motion for peremptory writ of mandate, pursuant to a petition for writ of mandate filed under the provision of §1085 CCP. It was heard on March 30, 1987, in Department 85 of Superior Court, the Honorable Jerry Fields, Judge presiding. Cecil Marr appeared as attorney for Petitioner and the moving party, and the Respondents were represented by the Office of the Los Angeles City Attorney and Assistant City Attorney Robert Cramer.

As evidence, the Court admitted the "Request for Judicial Notice" (filed February 2, 1987) and the attached documents, which included Los Angeles City Charter §§112, 135, and 202; Rule 12 of the Rules of the Board of Civil Service Commissioners; the Statement of Decision by Judge Deering in *Los Angeles City Employees Union, SEIU, Local 347 v. Board of Civil Service Commissioners*, Superior Court Case No. C603176; and certain documents from City Council file No. 77555, pertaining to the legislative history of Charter §112. In addition, the Court admitted the verified petition, and the documents (Exhibits A through I) appended to that petition.

The Petitioner made a timely request for a Statement of Decision. This Court's Statement of Decision was set forth orally by the Court, and was reported in the transcript of proceedings taken by the Court Reporter. The Court ordered that such transcript be prepared and transmitted to the parties, without charge to the parties.

In presenting its Statement of Decision, the Court referenced the Statement of Decision issued by Judge Warren Deering in *Los Angeles City Employees Union, SEIU, Local 347 v. Board of Civil Service Commissioners*, Superior Court Case No. C603176 (filed October 22, 1986). That document was among those judicially noticed by the Court and the extent of the reference was set forth by the Court in its oral decision.

Based upon the evidence and the arguments of counsel, the Court found that a writ of mandate pursuant to §1085 CCP should be granted, because the City's procedure for reviewing disciplinary matters (such as the Petitioner's discharge) is inconsistent with both state and federal constitutional due process, in that Charter §112(a) provides that the Board of Civil Service Commissioners may not order a lesser penalty unless the appointing authority consents to that lesser penalty. The Court further found that the language "with the consent of the appointing authority" is severable from Charter §112(a).

Based on the foregoing and the reasoning set forth in the Court's Statement of Decision, the Court ordered the following writ of mandate issue.

IT IS HEREBY ADJUDGED, ORDERED AND DECREED:

1. That a peremptory writ of mandate issue under seal of this Court, commanding Respondents as follows:

YOU ARE HEREBY COMMANDED immediately on receipt of this writ to provide an expeditious hearing conducted by the Board of Civil Service Commissioners which will include an adjudication of the amount of penalty to be assessed against the Petitioner. The hearing and adjudication is to be conducted by the Board of Civil Service Commissioners pursuant to the provisions of Charter §112 and its rules, but without giving effect to the language "with the consent of the appointing authority." Neither the Board of Civil Service Commissioners, nor any other officer, agent, or entity of the City of Los Angeles is to be influenced or bound by the consent or the lack of consent of the appointing authority to any penalty.

YOU ARE FURTHER COMMANDED to award and to provide the Petitioner all pay, benefits, seniority, and other emoluments as if he had been fully reinstated for the period from the date of his discharge (December 19, 1986) until March 30, 1987. In addition, you are to pay interest on the award of back pay at the full legal rate, computed on each paycheck which he would have received during the period of December 19, 1986, to March 30, 1987, from the date he would have received that check had he not been discharged until the date he receives his back pay.

YOU ARE FURTHER COMMANDED that in the future you are to give no effect to the language of Charter §112 which states "with the consent of the appointing authority".

YOU ARE COMMANDED to take action in light of the Court's Judgment and Statement of Decision, and to take any further action specifically enjoined upon you by law; but nothing in this writ shall limit or control in any way the discretion legally vested in you; and

YOU ARE FURTHER COMMANDED to make and file a return on this writ on or before May 20, 1987, setting forth what you have done to comply.

2. That the Petitioner is entitled to attorney fees pursuant to CCP §1021.5; that the amount of those attorney fees shall be established by motion filed on the Court's normal motion calendar; and that such motion shall be filed within sixty days of the signing of this judgment unless there is an appeal by any party to this action. In the event of an appeal, such motion shall be filed within sixty days of the issuance of a remittitur by the Court of Appeal returning this action to the Superior Court.

3. Petitioner is entitled to costs against Respondents pursuant to the filing of a Memorandum of Costs and Disbursements, in the sum of 156.50.

Dated: 4/20/87

/s/ Jerry K. Fields
JUDGE, SUPERIOR COURT

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROGER BURRELL,,
Petitioner,
vs.
CITY OF LOS ANGELES, et al.
Respondents.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Donald A. Johnson being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business addresss is 3550 Wilshire Blvd., Suite 916, Los Angeles, California 90010. On this date, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

ROBERT CRAMER, ESQ.
Assistant City Attorney
1800 City Hall East
200 North Main Street
Los Angeles, CA 90012

That affiant makes this service, for CECIL WILLIAM MARR, Counsel of Record, MARR & MARCHANT, Attorneys for Petitioners herein, and that to the best of my knowledge all persons required to be served in said action have been served.

Donald A. Johnson

On October 17, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Donald A. Johnson, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

WITNESS my hand and official seal.

OFFICIAL SEAL
Theodore Matsuo Wilden
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 30, 1990

Notary Public in and for
said County and State

No. 89-651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROGER BURRELL,
Petitioner,
vs.
CITY OF LOS ANGELES, et al.,
Respondents.

LOS ANGELES CITY EMPLOYEES UNION, et al.,
Petitioners,
vs.
BOARD OF CIVIL SERVICE COMMISSIONERS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FIVE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES K. HAHN, City Attorney
FREDERICK N. MERKIN, Senior Assistant City Attorney
ROBERT CRAMER,* Assistant City Attorney

1800 City Hall East
200 North Main Street
Los Angeles, California 90012
(213) 485-5432
Attorneys for Respondents

*Counsel of Record

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Where an independent civil service disciplinary tribunal has found, after a full and fair hearing, that (a) an appointing authority has established the facts alleged to justify an employee's discipline, (b) the penalty imposed is not irrational, and (c) the appointing authority who imposed the penalty is not actually biased against the employee, does the federal Constitution require a further hearing on the magnitude of the penalty imposed?

2. May a civil service manager, who is not actually biased against the interests of a subordinate employee, constitutionally initiate civil service discipline against the employee and, assuming the facts justifying discipline are proven, set and impose a rational penalty?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Page

California Statutes

Local Statutes

No. 89-651

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

ROGER BURRELL,
Petitioner,
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CITY OF LOS ANGELES, et al.,
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LOS ANGELES CITY EMPLOYEES UNION, et al.,
Petitioners,
vs.
BOARD OF CIVIL SERVICE COMMISSIONERS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

California's Court of Appeal opinion, which petitioners are asking this Court to review, resulted from the consolidation of two separate appeals.

In *Roger Burrell v. City of Los Angeles, et al.* ("Burrell"), the City of Los Angeles ("City"), Douglas S.

Ford, and the City's Board of Civil Service Commissioners ("Board") appealed from the judgment of the Superior Court of Los Angeles County entered April 20, 1987 granting a peremptory writ of mandate under California Code of Civil Procedure §1085 and holding unconstitutional a portion of Los Angeles City Charter §112 ("Charter §112").

In *Los Angeles City Employees Union, et al. v. Board of Civil Service Commissioners, etc., et al.* ("LACEU"), the Board, the City, and James E. Hadaway appealed from the judgment of the Superior Court of Los Angeles County entered May 15, 1987 declaring unconstitutional a portion of Charter §112 and ordering the issuance of a peremptory writ of mandate under California Code of Civil Procedure §1094.5.

The California Court of Appeal reversed both judgments and denied rehearing. The California Supreme Court denied a petition for hearing.

These appeals both concern an attack on a portion of Charter §112, the Los Angeles City Charter provision which initiates the post-deprivation procedure established by the City and the State of California to review administrative discipline imposed on all City civil service employees other than sworn police officers and firefighters.[1]

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[1] Los Angeles City Charter §112 reads as follows:

"Sec. 112. (a) Any board or officer having the power of appointment of officers, members and employees in any department of the government of the city shall have the power to remove, discharge or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board or officer having the power

(continued)

Charter §112 provides that civil service terminations and suspensions may occur only for cause. Such

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(ftn. continued)

to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended to be reinstated or restored to duty. The board with the consent of the appointing authority may also order a reduction in the length of the suspension, or substitution of a suspension for a removal or discharge, if the board finds, in writing, that such action is warranted. The order of said board with respect to such removal, discharge or suspension shall be forthwith certified to the appointing board or officer, and shall be final and conclusive; provided, that the order of any appointing board or officer suspending any person because of lack of funds in such department shall be final, and shall not be subject to review by said Board of Civil Service Commissioners. If the Board of Civil Service Commissioners shall order that any person removed, discharged or suspended under the provisions of this section be reinstated or restored as above provided, the person so removed, discharged or

(continued)

discipline takes effect upon the filing with the City's Board of Civil Service Commissioners of a written certification that the reasons for an adverse action have been served in writing upon the concerned employee. Within a prescribed time of the effective date of the discipline, both the Board and the employee have the right to request an investigation of "the grounds stated for such removal, discharge or suspension." Upon completion of the investigation, the Board is given two options:

> (1) If the Board finds that the grounds stated for the discipline were insufficient or were not sustained, and also finds that the employee is a "fit and suitable person to fill the position" in which he was disciplined, the Board must order that the employee be reinstated or restored to duty.
>
> (2) If the Board finds that the grounds stated for the discipline were sufficient and sustained, the Board may still order a reduction in the length of any suspension, or the substitution of a suspension for a termination, but only if the appointing authority of the employee's operating department or office consents to such a reduction or substitution.

It is the latter option — the necessity for consent of the appointing authority before penalty modification

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(ftn. continued)

suspended shall be entitled to receive compensation from the city the same as if he had not been removed, discharged or suspended by the appointing board or officer."

where the grounds for discipline were independently found to be sufficient and sustained — which the petitioners in these cases seek to attack. The petitioners erroneously maintain that the City's appointing authorities hold an unconstitutional "veto power" over the Board and, ultimately, a power of review over the same discipline decision the appointing authority originally made. Pet. at 11. Petitioners take the position that the City must provide a post-disciplinary appeal which gives the Board itself full power not only to decide whether the grounds stated for the discipline have been established and are sufficient to justify punishment, but also to set — without limitation — an appropriate penalty.

Petitioners have materially mischaracterized the City's discipline review process and are attempting to apply legal principles which do not support the positions for which they are advanced. The court of appeal opinion whose review is sought is well-researched; it accurately collects and summarizes the relevant federal and California authorities, and it assists public employers throughout California. The opinion logically flows from a consistent body of federal appellate authority. California's courts have, as the court of appeal opinion reflects, applied federal authority accurately and uniformly. For these reasons, review by this Court is not merited, and certiorari should be denied.

It is the City's position that no authority holds that an employer is required constitutionally to establish a civil service discipline appeal process in which an independent board or other entity has full power both to adjudicate the factual basis for a disciplinary action and to set the level of appropriate penalty. On the contrary, what is constitutionally required is, first, a predeprivation process in which an employee is notified of a proposed disciplinary action, is provided with a factual basis for

the proposed disciplinary action, and is given a meaningful opportunity to state his side of the dispute. *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Skelly v. State Personnel Bd.*, 15 Cal.3d 94, 124 Cal.Rptr. 14, 539 P.2d 774 (1975). Either pre- or post-discipline, the employee is futher entitled to a process, either through local or state law, which allows him a full opportunity to sift through the evidence and to question the factual basis for the discipline imposed. See generally, Pet. App. A, at A9 and A15; *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Although the final decision on the facts and the penalty must, of course, be made by an unbiased decisionmaker, and a penalty may be overturned if bias is present, the burden is on the employee to prove that actual bias was present in his case. Pet., App. A, at A15; *Hortonville Joint School Dist. No. 1 v. Hortonville Education Assn.*, 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976); *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975).

The City's system, embodied in Charter §112, allows the Board to strike any penalty which it finds to be an abuse of an appointing authority's discretion. If the Board finds that the facts alleged in support of discipline are sustained, but that those facts are not sufficient to support the penalty which the appointing authority has imposed, the Board is required to restore the employee to his former position, with or without the appointing authority's consent. The Board may not, of course, overturn a penalty as to the propriety of which reasonable minds could differ. But if the imposed penalty exceeds the bounds of reason, the Board is obliged to reverse it. This system is consistent with the authority of the California courts to review administrative discipline under state statute. California Code of Civil

Procedure §1094.5; *e.g., Nightingale v. State Personnel Bd.*, 7 Cal.3d 507, 515, 102 Cal.Rptr. 758, 498 P.2d 1006 (1972).

The City further maintains that its appointing authorities have no "veto power" over the Board, since under Charter §112 the Board has no power unilaterally to set a penalty once facts supporting discipline have been shown to the Board's satisfaction. The appointing authority is not, therefore, required to review his own original decision, since he is not obliged, constitutionally or statutorily, to review anything. Petitioners' claims to the contrary, Pet. at 11 and 13, are erroneous and are not supported by the City Charter or by other authority in the record.

Charter §112 provides that, where the facts supporting discipline have been shown, the final decision on penalty in nonsworn civil service disciplinary appeal cases rests with the appointing authority — usually the head of the employee's department. The appointing authority bases his original penalty decision upon facts which are ultimately established by the Board.

The appointing authority may be a governing board or an individual, and is often the person or board who approved the initiation of the disciplinary process. In spite of their occasional involvement in the initiation of discipline, appointing authorities are not, under established law, necessarily biased against the positions advanced by those employees who challenge discipline. "It is presumed that official duty has been regularly performed." California Evidence Code §664.

Numerous decisions hold, and the California Court of Appeal recognized, that to overturn discipline in an individual case, a much more substantial showing of bias is required than a mere initiation or approval of disciplinary charges. Pet., App. A, at A12-A13. For plaintiffs

to succeed in demonstrating bias in an individual case, they would need to show such a connection between a decisionmaker and the facts in dispute as to seriously call into question the decisionmaker's detached judgment. *E.g., Brasslett v. Cota*, 761 F.2d 827 (lst Cir. 1985). Cases in which bias has been found consistently involve political or pecuniary motivations causing the decisionmaker to be less than forthright in evaluating an employee's contentions. *Id.*; see generally, Pet., App. A, at A13-A15. Absent such a showing, bias cannot be demonstrated in an individual case. Obviously, such bias can never be shown through speculation about what an appointing authority might do in the future.

Neither of the trial courts made any findings of individual bias in these cases. Such findings could not have been made, since the complaining parties below failed to show in their papers or argument that either of their general managers had any personal animosity toward them, or had any personal stake in the outcome of their disciplinary appeals. Further, neither complaining party showed below that allowing a department manager or governing board to be the final arbiter of discipline within a department necessarily results in a biased or otherwise unfair evaluation of a disciplinary appeal. Indeed, the City contends, absent an affirmative showing of bias from the conduct of a manager or from the relationship of that manager to the facts, the final setting of penalty by a department head is a rational system which allows the persons accountable for the effective operation of public organizations to supervise and control the performance of those who assist them in carrying out the public's business.[2]

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[2] Numerous jurisdictions utilize employee discipline systems similar to the one used in Los Angeles. The City and County of San

(continued)

Petitioners in these cases seek to deprive the City's appointing authorities of their charter-mandated power to set nonsworn civil service penalties, and seek to transfer that power to the Board of Civil Service Commissioners. This power was never granted to the Board by the City's voters or by any legislative act. The transfer of power would apply to all future discipline cases, but it was not constitutionally required even as to the individual employees now before the Court. For these reasons, the City asks this Court to deny the requested writ of certiorari, and to allow the judgments below to stand.

(ftn. continued)
Francisco's scheme, for example, allows no independent review of the magnitude of administrative suspensions of thirty days or less. Charter of the City and County of San Francisco, §8.342, Cal. Stats. 1971, Ch. 273, at 4739.

REASONS FOR DENYING THE WRIT

1. PETITIONERS HAVE MISCHARACTERISED THE CITY'S CIVIL SERVICE DISCIPLINE REVIEW SYSTEM

a. Neither the Federal nor the California Constitution Requires an Employer to Provide an Independent Penalty Review, So Long as the Ultimate Decisionmaker is Not Guility of Actual Bias and the Penalty Result is Not Arbitrary.

Petitioners contend that due process will not tolerate a system in which a constitutionally or statutorily mandated review of a civil service penalty decision is conducted by the original decisionmaker. Petitioners mistakenly assert that the City maintains a system in which appointing authorities are statutorily required to review and evaluate their own previous civil service penalty decisions. This erroneous characterization of the City's statutes has led the petitioners to cite case authority which does not address the issues on which this litigation turns.

Petitioners may be correct that traditional notions of due process will not tolerate a system in which a constitutionally mandated independent review of a civil service penalty decision is conducted by the original decisionmaker. *See Withrow v. Larkin, supra*, 421 U.S. at 58 n. 25, 95 S.Ct. at 1470 n. 25, 43 L.Ed.2d at 730 n. 25.

What eludes petitioners is (1) that civil service appellants enjoy no constitutionaly mandated right to an independent review of penalty decisions, and (2) that no review of the original penalty decision is conducted by the City's decisionmakers. What is constitutionally required, and what the City's system provides, is that the person rendering the ultimate decision on penalty not be guilty of actual bias, and that the penalty not be arbitrary or capricious, or otherwise an abuse of discretion. Pet., App. A, at A15.

Independent review of the penalty decision may well be constitutionally required, but only to the extent necessary to determine whether actual bias exists in the decisionmaker and to ensure that a factual basis exists for the penalty. *Id.* The California Court of Appeal has stated, and petitioners have been unable to accept, that neither the federal nor the California constitution requires that an independent body be provided to supply a *de novo* examination of the factors contributing to the magnitude of the imposed penalty. *Id.* at A15, A20-A21.

As the California Court of Appeal observed, Los Angeles City Charter §112 satisfies all state and federal due process requirements. Pet., App. A, at A21. An independent review tribunal, the City's Board of Civil Service Commissioners, is empowered to determine whether a factual basis exists for the penalty previously imposed. The Board is empowered to nullify the penalty if it determines after hearing that the factual grounds stated for discipline were insufficient or were not sustained. The disciplined employee is permitted at the hearing to advance any evidence he may have that the decisionmaker was motivated by actual bias toward the employee, or that the penalty imposed was so severe as to defy reason. Beyond this review for arbitrariness and actual bias, the Board is empowered only to suggest to

the appointing authority that the penalty previously chosen should be reduced. The entire administrative review process supplied by the City is subject to further review in the California state courts. California Code of Civil Procedure §1094.5.

Petitioners contend that an independent employer review of the magnitude of a civil service discipline penalty is constitutionally required. No reported decision so holds. Instead, petitioners analogize the conclusion they seek from holdings in criminal parole revocation hearings and similar proceedings, such as in *Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 884, 51 L.Ed.2d 92 (1977), and in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Unfortunately for petitioner's argument, the issue in a parole hearing is whether the specific penalty of revocation is factually supported. Conversely, the issue presented to this Court is, assuming the facts support some level of discipline, whether an independent hearing on the magnitude of penalty is then constitutionally required.

b. Contrary to the Petitioners' Assertion, an Appointing Authority Under the City's Discipline Review System is Not Statutorily Required to Review and Evaluate His Own Prior Decisions.

Citing *Withrow v. Larkin, supra*, petitioners maintain that the federal Due Process Clause will not countenance a civil service discipline review system in which a decisionmaker is required to review and evaluate his own prior decisions. A portion of *Withrow*, cited in the

Petition at 13-14, constitutes *dicta*; the respondents are prepared, however, to accept the proposition that if the Constitution compels an independent review of the magnitude of a penalty, or if a statute requires that such an independent review occur, then the required independent review would not be present if a decisionmaker were compelled to review and evaluate his own prior decision. As set out in the previous section, however, neither the federal nor the California constitution requires an independent review of a civil service penalty decision. Further, as set out below, the penalty determination system mandated by Los Angeles City Charter §112 does not require appointing authorities to review and evaluate their own prior decisions.

Under Charter §112, the penalty decision of the appointing authority is final, unless the Board of Civil Service Commissioners finds no factual basis for the decision, or unless the Board can convince the appointing authority to reduce it. At no point in the City's discipline review system is an appointing authority required to adjudicate, or otherwise required to review, his own previous determination. The original penalty determination, once made, is final and is not technically subject to review by anyone unless the Board finds in writing that no factual basis exists to support it.

If factual support does exist for the penalty imposed, the appointing authority may reduce the level of discipline, but he is not required statutorily to grant any consideration to a penalty reduction request. Absent a requirement that the appointing authority sit in judgment over his own previous decision, the *Withrow v. Larkin dicta* is not applicable to the City system or to the cases now before the Court.

The California courts have, as set out in the California Court of Appeal opinion, interpreted Charter §112 in

conformity with the views expressed by the City above. Pet., App. A, at A20-A21. This petition asks this Court to countermand the California judiciary's reading of Charter §112, and then to hold the resulting statute unconstitutional. This transparent attempt must be rejected.

CONCLUSION

For all of the above reasons, it is clear that the decisions of the federal courts, on the issues presented, are harmonious and uniform. The questions of federal law presented are, as noted by California's Court of Appeal, well-settled. This petition asks the Court to interpret a California statute in a manner inconsistent with the reading given it by the California courts. Since the California courts have accurately applied federal doctrine to the issues presented, respondents request that the Petition for Writ of Certiorari be denied.

December 15, 1989

Respectfully submitted,

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No. 89-651

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROGER BURRELL,
Petitioner,
vs.
CITY OF LOS ANGELES, et al.,
Respondents.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Esiquia Gonzales, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business address is 3550 Wilshire Boulevard, Suite 916, Los Angeles, California 90010. On this date, I served the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

CECIL WILLIAM MARR
MARR & MARCHANT
A Law Corporation
3255 Wilshire Blvd., Suite 830
Los Angeles, CA 90010

That affiant makes this service, for ROBERT CRAMER, Counsel of Record, CITY OF LOS ANGELES, Attorneys for Respondents herein, and that to the best of my knowledge all the persons required to be served in said action have been served.

Esiquia Gonzales

On December 15, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Esiquia Gonzales, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

Witness my hand and official seal.

OFFICIAL SEAL
Theodore Matsuo Wilden
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 30, 1990

Theodore Matsuo Wilden
Notary Public in and for
said county and state